FILE COPY

No. 208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

S. W. RICHARDSON,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GENE M. WOODFIN
11th Floor, Esperson Building
Houston 2, Texas
Attorney for Petitioner,
S. W. Richardson

Of Counsel:

J. EVANS ATTWELL
JAMES W. McCARTNEY
VINSON, ELKINS, WEEMS & SEARLS
11th Floor, Esperson Building
Houston 2, Texas

SORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
(a) Factual Background	3
(b) Action of the Commission	4
(c) Judgment of the Court of Appeals	5
Reasons for Granting the Writ	7
Argument	9
I The Court Below Has Decided Erroneously That Section 7 of the Act Abrogates the Term Provisions of Producer Contracts and Compels Continuation of Sales After the Expiration of Such Agreements	11
(a) Term of Petitioner's Contract Not Extended by Certificate of Public Convenience and Necessity Issued Him Nor by Operation of Section 7(b)	11
(b) Misconstruction of Language of Petitioner's Certificate	15
(c) Section 7(b) of Act Not Prevent Petitioner from Lawfully Discontinuing Deliveries of Gas After Expiration of His Agreement	16
(d) Act Adequate as Written	19
II Petitioner Was Wrongfully Denied the Hearing On His Certificate Application Guaranteed By Section 7 of the Act	20
Conclusion	22

TABLE OF CASES

Atlantic Refining Co. v. Pub. Ser. Comm. of N. Y. ..... U.S. ..... (1959)	9
Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581 (1945)	17
Continental Oil Co. v. Federal Power Commission (CA 5, 1959) 266 F. 2d 208	6, 16, 18
Deep South Oil Co. of Texas v. Federal Power Commission, (CA 5, 1957) 247 F. 2d 882, cert. den. 355 U.S. 930	18
Dickinson v. Pet. Conv. Corp., 338 U.S. 507 (1950)	19
Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944)	18
Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949)	17
Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682 (1947)	17

	Page
J. M. Huber Corp. v. Fed. Power Comm. (CA 3, 1956) 236 F. 2d 550, cert. den. 352 U.S. 971	16
John Hancock Mutual Life Ins. Co. v. Bartels, 308 U.S. 180 (1939)	19
Mississippi Fuel Corp. v. Federal Power Commission, (CA 3, 1953) 202 F. 2d 899, pet. for cert. dis'm 345 U.S. 985	20
Northeastern Gas Trans Co. v. Federal Power Commission (CA 3, 1952), 197 F. 2d 872, cert. den. 344 U.S. 818	21
Panhandle Eastern Pipe Line Co. v. Federal Power Commission (CA 3, 1953), 204 F. 2d 675	13
Phillips Petroleum Co. v. Wisconsin, et al, 347 U.S. 672 (1954)	7, 17, 18
Skelly Oil Co. v. Phillips Petroleum Co. (CA 10, 1949), 174 F. 2d 89, Reversed 339 U.S. 667	11
Sun Oil Company v. Federal Power Commission (CA 5, 1959), 266 F. 2d 222	6, 14, 15
Sunray Mid-Continent Oil Company v. Federal Power Commission, 353 U.S. 944 (1957)	12, 14
United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956)	6, 8, 12, 13
Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923)	22

OTHER AUTHORITIES

Natural Gas Act of 1938 52 Stat. 821 as amended, 15 U.S.C. Secs. 717, et seq.:	
Generally	2, 3, 8, 19, 20, 21, 22
Section 1(b)	7, 17
Section 4	3, 12, 13, 19, 20
Section 5	3, 12, 13, 19, 20
Section 7	2, 3, 6, 8, 11, 12, 13, 14, 15, 19, 20, 21, 22
Section 7(a)	13
Section 7(b)	7, 10, 13, 16, 18, 19
Section 7(e)	13, 20
Section 19(b)	3, 5, 6
Federal Power Commission Rules and Regulations:	
154.94	5
157.28(e)	4
157.29	4
Commission Rules of Practice:	
Rule 1.32	13

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Petitioner S. W. Richardson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 17, 1959, (R. 144)[1] together with the underlying decision of that Court dated April 17, 1959. (R. 142). These affirmed the order of the Federal Power Commission (App. 52a) on rehearing (App. 54a) which rejected without hearing Petitioner's application for a certificate of public convenience and necessity, the filing of his underlying gas sales contract as an initial rate schedule, and his request for emergency authorization under Section 157.28(c) of the Commission's Rules and Regulations.

[1] The record certified from the Court below will be referred to as "R"; the Appendix to this petition as "App.".

OPINIONS BELOW

The Federal Power Commission's Order was in letter form dated October 3, 1957. It appears in the record at page 123 as set forth in the Appendix at page 52a. The order of the Commission denying Petitioner's application for reconsideration and the dissent filed therein appear in the record at page 137, and are set forth in the Appendix at page 54a. The opinion of the Court below is reported at 266 F. 2d 233 and is set forth in the Appendix at page 1a, together with other opinions issued the same date, to which it refers.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1959, (R. 144). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254, Sub. 1. 62 Stat. 928 and, the Natural Gas Act, Section 19(b), 15 U.S.C. Sec. 717 r(b).

QUESTIONS PRESENTED

Urged as Reasons for Granting the Writ

1. Does Section 7 of the Natural Gas Act, or a certificate of public convenience and necessity issued thereunder, vitiate the term provision of a producer's gas sales contract and compel continued production and deliveries of gas after the contract's expiration date?

2. Is a new certificate of public convenience and necessity required to make sales of gas pursuant to a new and distinct contract which covers acreage formerly included under an expired agreement? Should such new contract be filed as an initial rate schedule?

3. Can the Federal Power Commission lawfully deny Petitioner a hearing on his application for a certificate of public convenience and necessity based upon a new gas

sales contract covering acreage from which sales had previously been made under an expired agreement by summarily rejecting his application and contract filing?

STATUTES INVOLVED

The relevant provisions of Sections 1, 4, 5, 7 and 19 of the Natural Gas Act of 1938, 52 Stat. 821 as amended, 15 U.S.C. Sec. 717, et seq., are set forth in the Appendix to this Petition (App. 58a), with relevant portions of the Regulations thereunder, and the Commission's Rules of Procedure (App. 66a).

STATEMENT OF THE CASE

This is an appeal from the Commission's summary rejection of Petitioner's application for a certificate of public convenience and necessity to authorize sales and deliveries of gas under a contract between Petitioner and Southern Natural Gas Company (Southern Natural) dated September 16, 1957, and the ancillary rejection of the contract as an initial rate schedule.

(a) Factual Background:

Petitioner entered into a contract with Southern Natural, dated August 26, 1947, covering the sale of gas produced from certain oil, gas and mineral leases in the Gwinville Field Area, Jefferson Davis and Simpson Counties, Mississippi for a term of ten years from the effective date, September 9, 1947, (R. 12). Subsequently, in conformance with the Commission's Order No. 174-A, an application for a certificate of public convenience and necessity (certificate) was filed and assigned Docket No. G-6252 (R. 49). The certificate granted by the Commission's order issued October 24, 1956, provided *inter alia* that it should remain effective

only so long as applicant continued the acts or operations authorized. The contract was filed as an initial rate schedule. Gas deliveries, which had been previously begun on September 9, 1947, continued until Petitioner's contract expired by its own terms on September 9, 1957. Deliveries were then terminated (R. 130).

Petitioner entered into a new contract with Southern Natural dated September 16, 1957. Application for a certificate to make deliveries under this agreement was filed by Petitioner on September 16, 1957, under Docket No. G-13272. Notice was given the Commission that deliveries of gas had been commenced under Section 157.29 of the Commission's Rules and Regulations and temporary authorization under Section 157.28(c) was sought (R. 85, 86).[2]

(b) Action of the Commission:

By order in letter form dated October 3, 1957, issued over the signature of the Secretary, and purportedly under his delegated authority, the Commission rejected without a hearing the application and request for temporary authorization on the ground that the application covered "acreage" previously certificated for sales by Petitioner to the same buyer. Specifically the order stated:

> "Such certificate application covers the acreage of S. W. Richardson in the Gwinville Gas Units Nos. 4, 5, 6, 8, 22 and 29 in the Gwinville Field, Jefferson Davis County, Mississippi, and duplicates the acreage covered by the certificate issued to S. W. Richardson in Docket No. G-6252 for sales to the same buyer, Southern Natural Gas Company. Such previously issued certificate is still applicable to the gas sales from the acreage, even though the term of the gas sales contract, dated

[2] Section 157.28(c) identifies the information which applicant must furnish to qualify for temporary authorization to commence deliveries of gas.

August 26, 1947, (which was incorporated by reference in such certificate application) has expired (App. 52a)."

The Commission also rejected Petitioner's contract filing because it did not conform to the Commission's Regulations, relating to *changes* in existing rate schedules. Petitioner was offered the opportunity to retender the contract as a change of rate in accordance with the requirements of Section 154.94 of the Regulations (App. 66a). He did not, however, make the suggested alternative filing (App. 2a).

Petitioner filed his application for rehearing on October 28, 1957, renewed his certificate application and retendered the 1957 contract as an initial rate schedule (R. 127).

On September 27, 1957, the Commission, with Commissioner Digby dissenting, denied the petition for reconsideration and rejected the second tender of the certificate application and contract, reaffirming its reasons previously given for such rejection. Commissioner Digby dissented from the order, stating that the application should at least have been accepted for filing and set for rehearing (App. 56a). Petition to review under Section 19(b) of the Act was filed January 11, 1958 (R. 1).

(c) Judgment of the Court of Appeals:

The Court of Appeals for the Fifth Circuit, with one judge dissenting, filed its opinion and judgment on April 17, 1959, affirming the order of the Commission. Four other cases involving similar issues were decided by the Court at the same time.[3] While consolidation was refused (R. 7) and separate opinions filed in each of the cases, the majority below held Petitioner's appeal to be controlled by the same

[3] The Sun Oil Company v. Federal Power Commission, No. 17040. Humble Oil & Refining Company v. Federal Power Commission, No. 17128. Hunt Oil Company v. Federal Power Commission, No. 17256; and Magnolia Petroleum Company v. Federal Power Commission, No. 17136.

principles set forth in its opinion in *Sun Oil Company* v. *Federal Power Comm.* (App. 2a) and affirmed the orders of the Commission for the reasons which were there stated. It noted only the factual difference that Petitioner had not made an alternative filing of his new contract as a rate change as had Petitioners in the "companion cases" (App. 2a). Other factual differences which existed were not noticed.

In *Sun* the majority held specifically that the contract of petitioner there did not provide for an initial rate and that therefore no new certificate of public convenience and necessity was proper. It reasoned and held collaterally that the certificate issued to petitioner under Section 7 authorizing sales under the 1947 contract had not lapsed although the ten year term of the agreement had expired; that petitioner could not lawfully terminate deliveries of gas to Southern Natural without Commission approval, that sales under the new contract were "a continuation of service" and the new contract itself, merely a change of rate. It approved summary rejection of the application for a new certificate and contract filing for the stated reason the Petitioner had no "right" to a certificate which duplicated one outstanding and operative, and that where the contract tendered for filing was a nullity as an initial rate filing, the Commission was authorized to reject it without notice and hearing. Reference was made to the Court's opinion filed the same day in *Continental Oil Company* v. *Federal Power Commission*, 266 F. 2d 208 (App. 25a) and the reasons there stated for its holding that Petitioner's sales and facilities were within the scope of Section 7(b) of the Act and could not be abandoned without Commission approval.

Relying in part upon this Court's decision in *United Gas Pipe Line Company* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956), the dissent filed by Judge Brown rejects as illogical

the conclusion that the new contract was merely a "change in rate". It further states that only a producer's sales subject him to the Act. So long as he sells gas in interstate commerce, he is subject to regulation; when the sale is completed, he may withdraw if he chooses. Judge Brown concludes that by misreading Section 7(b) to force continued sales until a reservoir is exhausted the majority unlawfully changes the contract and destroys the last remnant of the exemption of production from Commission jurisdiction provided by Section 1(b) of the Act.

REASONS FOR GRANTING THE WRIT

This case vitally affects all producers of natural gas making interstate sales under certificates of public convenience and necessity. The decision below holds in effect that the term provision in producer contracts is meaningless and that jurisdictional sales once commenced cannot be discontinued without Commission approval. This holding is without statutory authority and is contrary to general language of certificate authorization under which such sales are made.

The burgeoning of gas transmission lines in the last two decades has been supported in part by commitments for gas supplies based on long term agreements, usually for a period of twenty years or more. Petitioner's case comes early to this Court as his agreement provided a ten year term. The great bulk of such contracts, under which producers dedicate and sell gas to pipe line companies, will begin a series of expirations during the next several years.

At the time Petitioner's agreement was made, it was not thought that the selling party was in any manner subject to regulation under the Natural Gas Act. This notion was dispelled by *Phillips Petroleum Company* v. *Wisconsin, et al.*, 347 U.S. 672 (1954). While the regulated producers did not voluntarily assume or accept the burdens of ortho-

dox utility regulation, they *did* have the assurance that the integrity of their private agreements was guaranteed under the Act. *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

The opinion below not only affects those contracts which have been completely performed and destroys the freedom of gas producers to contract for interstate sales for a limited period of time, it has the further effect of erasing from the Act the last vestige of the production and gathering exemption, Section 1(b). There is no reason for this result.

By misconstruction of Section 7 of the Act, the majority determines erroneously that the effective life of the authorizing certificate of public convenience and necessity replaces the term of the producer's privately negotiated agreement. As a result of its decision, the term provisions of thousands of producer contracts scheduled for expiration over the next several years are nullified; sellers are compelled, contrary to contract and express prohibition by the Act, to deliver amounts of gas in excess of those committed. The vehicle for this result is the affirmance of a Commission order which rejected Petitioner's certificate application and contract filing without a hearing. Would hearings be afforded other complainants if this Court sanctions the summary method tried and proven below?

While this result is erroneously said to be in the best interest of consumers, no direct support is found for such in the Natural Gas Act, no economic or practical justification is established for such principle in order to assure efficient administration of the Act, and no historical precedent is shown. In short, the producer having entered upon a most unstable and speculative area of business finds himself confronted with the risk never conceived or assumed —

that he is forced to continue in a regulated business, without right of retirement, during the productive life of his property.

To compound the impact of this case, this Court has said recently in its opinion issued June 22, 1959, in *The Atlantic Refining Company, et al.* v. *Public Service Commission of New York, et al:*

> "Section 7(c) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval." (Folio copy, p. 10)

Although the issue of contract-term expiration was not before the Court, was not briefed, argued, or urged, this statement will undoubtedly become the subject of grave misconstruction when applied to the thousands of expiring producer contracts. A matter of such basic and wide sweeping concern deserves detailed consideration by this Court, and requires its interposition by writ of certiorari.

ARGUMENT

The ten year term of Petitioner's first contract with Southern Natural expired September 9, 1957. The valves controlling the flow of gas from Petitioner's delivery point were closed and physical deliveries to Southern Natural were discontinued (R. 139). A new agreement was negotiated with the same purchaser for a twenty year term at a higher rate. Upon its execution, deliveries were commenced and emergency authorization requested. The majority below held that the new contract represented a "renewal" agreement and a continuation of service and sought merely to effect a "change" in rate. It reasoned that the effective

term of the certificate of public convenience and necessity authorizing sales under the expired contract was unlimited except as measured by Section 7(b) of the Act. The term of the certificate, therefore, replaced the term of the contract; and as Petitioner was compelled to continue sales, there was no warrant for a "second" certificate based upon an initial rate.[4] It is this rationale which brings the issue clearly into focus.

I.

THE COURT BELOW HAS DECIDED ERRONEOUSLY THAT SECTION 7 OF THE ACT ABROGATES THE TERM PROVISIONS OF PRODUCER CONTRACTS AND COMPELS CONTINUATION OF SALES AFTER THE EXPIRATION OF SUCH AGREEMENTS.

(a) Term of Petitioner's Contract Not Extended by Initial Certificate Issued Him Nor by Section 7(b) of the Act:

Under the compulsion of the Commission's Order 174-A, Petitioner, in November of 1954, applied for a certificate of public convenience and necessity to authorize sales of gas then being made to Southern Natural under the 1947 Agreement (R. 49). This agreement, which expired by its own terms on September 9, 1957, was filed as a rate schedule pursuant to applicable Commission Regulations (R. 9). On October 24, 1956, a certificate was issued which provided *inter alia* that it

> "• • • shall be effective *only so long as applicant continues the sales or operations hereby authorized in accordance with the Natural Gas Act*, and the applicable rules, regulations and orders of the Commission." (R. 61, emphasis supplied)

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[4] The sales price under the expired agreement at the date of its expiration was 8c per Mcf of gas; under the new agreement it was 20c per Mcf of gas.

The majority attached controlling significance to the certificate "term", whether it was specially limited or continuing. The initial certificate authorization was required to be co-terminal with the underlying agreement; but putting this aside, it could not, under the circumstances of its issuance, have the effect attributed — modification of the contract term.

Section 7 of the Act requires the issuance of certificates of public convenience and necessity before jurisdictional sales can be commenced. Specifically, it provides:

> "(c) No natural-gas company * * * shall engage in the * * * sale of natural gas, subject to the jurisdiction of the Commission * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * *"
>
> * * * *
>
> "(e) * * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application if it is found that the applicant is able and willing to do the acts and to perform the service proposed and to conform to the provisions of this chapter. * * * and that the proposed * * * sale * * * is or will be required by the present or future public convenience and necessity * * *."

The Commission is thus delegated authority to examine and review the *proposed* sale and issue certification if such sale is required by the public convenience and necessity. This is the certificate; it is permissive, not contractual in character. *Skelly Oil Company* v. *Phillips Petroleum Co.* (CA 10, 1949), 174 F. 2d 89, reversed on other grounds, 339 U.S. 667. While such certificate was required for continued sales under the 1947 Contract, it did not contain language nor have statutory influence to lengthen, destroy, or otherwise affect the contract term.

Admittedly private contracts are made subject to paramount regulatory authority, but Section 7 of the Act contains no prohibition of term commitments by producers of natural gas. In its Procrustean application of that Section, the majority below disregards the rule of *Mobile*, which recognized the integrity of private contracts and their stature under the Act. Instead, it attempts to apply the decision in *Sunray Mid-Continent Oil Company v. Federal Power Commission*, 353 U.S. 944 (1957), a case wholly alien to the issues made here.

The controlling importance of contracts, in light of the regulatory scheme envisioned by the Act, was clearly stated in *Mobile*:

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. * * *
>
> "By preserving the integrity of contracts, it permits the stability of supply arrangements, which all agree is necessary to the health of the natural gas industry * * *. [T]he Natural Gas Act permits the relationship between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public. * * * The Natural Gas Act * * * recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules. * * *." (350 U.S. at 338, 339, 344, 345.)

Specifically, *Mobile* held that a contract for a fixed rate for a fixed term could not be unilaterally abrogated by a notice filing under Section 4 of the Act. Such change, either by one of the parties to the agreement or by the Commission, could be made only pursuant to hearing and appropriate findings under Section 5 of the Act. Contractual undertakings once fixed by the parties and accepted for

filing by the Commission are subject to change, therefore, only by mutual consent (with Commission review) or by hearing and the determination of unreasonableness which Section 5 requires.

While *Mobile* dealt with the application of Sections 4 and 5 of the Act to private contracts, it is no less applicable to Section 7. Quite apart from altering contracts, Section 7, like Sections 4 and 5, recognizes the power of the parties to agree initially and submit their agreements to the Commission for review. No contracting power is given the Commission. If the sale (or service) "proposed" or "any part" thereof is in the public convenience and necessity, a proper certificate will issue. If not, authorization will be denied. The Court below made much of the argument that the "authorization of the certificate is not only for the sale of gas pursuant to the contract but pursuant to and subject to the provisions of the Act" (App. 9a). This is so, but, the provisions of the Act (Section 7) limit the certificating powers of the Commission to a sale (or service) "proposed". Here, the sale (or service) proposed was the 1947 Contract, and no more.

Like other producer applications relating to gas sales, Petitioner's application for certificate was referrable and limited to the sales covered by the 1947 Contract. The certificate was issued under Commission rules authorizing the granting of the "authority requested" by the application.[3] Section 1.32, Commissions Rules of Practice, and

[3] The Commission has been held without power under Section 7(a) to order an extension of facilities where the result will be to compel additional production. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (CA 3, 1953) 204 F. 2d 675. The decision below, having the effect of compelling the prohibited increase in gas quantities deliverable under a contract by extending its termination date, was clearly contrary to the statute. It ironically holds that in this situation the Commission is empowered to escape limitations imposed by Section 7(a) and 7(e) via its Section 7(b) control of "abandonment" of service.

purported only to cover the sales described in the application and exhibits (R. 76). It was thus limited to the 1947 Contract and lapsed upon its expiration.

Apparently the court below believed that this Court's holding in *Sunray* was authority to the contrary. It reasoned erroneously that since the original certificate was not expressly limited, it continued in effect and covered Petitioner's sales to Southern Natural under the 1957 Agreement. Any new or further sales could only be a "continuation of service"; and any new rate agreement could only be a "change in rate".

Sunray, of course, held no more than that the Commission had adequate powers under Section 7 to issue certificates of specially limited duration. It is neither authority for the holding that Petitioner's certificate was unlimited nor for the implication made that where there is an existing certificate any new contract between parties following an expired agreement and providing for different sales price can only be for the continuation of service at a change in rate. Aside from being laid on the false premise that Petitioner's certificate was in effect perpetual, the conclusion that the 1957 agreement was merely a "renewal contract" or a "rate change" does not logically follow.[6]

The term of Petitioner's expired contract was an integral part of the agreement; it was of equal dignity with the other provisions. Having been duly filed and accepted by the Commission, it became inviolable against change, except pursuant to notice and hearing under the review sections of the Act. Until changed in this manner, *Mobile* assures that

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[6] The dissent filed by Judge Brown says: "Except for the imprimatur of this Court which states that it is *law* I do not at all think it follows, either normally or naturally *or necessarily*, that 'upon the *termination* of a contract' a 'new contract between the same parties' is a rate change. To reason from *existing* contract to *new* ones after termination is a non sequitur flying the face of *Mobile*." (App. 16a).

it may be relied upon by the parties and by the public. Section 7 does not prescribe the manner of change approved by the Court below.

(b) Misconstruction of the Language of Petitioner's Certificate:

The majority's error in construing the language of Petitioner's certificate is not immediately discernable from examination of the *Richardson* and *Sun* opinions. While other parties similarly situated may have continued in fact the sale and delivery of gas to Southern Natural after the expiration of their respective agreements, Petitioner did not (R. 160). He discontinued the "acts or operations" authorized by the first certificate by physically shutting off the flow of gas for a period of several days. The certificate provided that it "shall be effective only so long as applicant continues the acts or operations hereby authorized." If the time for expiration is as material as the majority believes, can this have any meaning other than that the certificate expired by its own provisions with the discontinuance of the acts or operations authorized? It is factually inaccurate to say that Petitioner's sales continued.

Neither Petitioner's contract nor the Act forbade discontinuance of gas deliveries to Southern Natural upon the expiration of the 1947 Contract. It is, of course, not contended that the scheme of the Act could be thwarted by unlawfully shutting off gas deliveries and thereby bringing about a premature termination of the authority to continue sales. Unlawful action could not affect, much less enhance, Petitioner's position; but both the certificate and the Act contemplate that the authorization will issue for a particular sale and that it *shall* terminate at some future time. No amount of sophistry can escape this conclusion. Was, then, Petitioner within his legal rights

and acting "in accordance with the Natural Gas Act" when he caused the certificated sales to be discontinued? The majority held that he was required to obtain prior Commission approval, citing its decision in *Continental Oil Co. v. Federal Power Commission* (*supra*) decided the same day (App. 25a).

(c) Section 7(b) of the Act Not Prevent Petitioner from Lawfully Discontinuing Deliveries of Gas After the Expiration of Agreement:

The Court below erroneously held that Petitioner's production facilities were subject to the jurisdiction of the Act and that termination of sales made by means of such facilities was not lawful unless authorized by the Commission pursuant to proper application, finding and order under Section 7(b) of the Act, Petitioner's contract to the contrary notwithstanding. Section 7(b) of the Act as drafted and consistently construed by this Court relates solely to the abandonment of facilities subject to the jurisdiction of the Commission and service rendered by means of such facilities. It provides in part:

> "No natural-gas company shall abandon * * * its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, * * *."

Had Petitioner been afforded a hearing, he would have shown that no such facilities were operated and that he did not, therefore, render any such service referred to in that section of the Act. Even the *Continental* and *Huber*[7] cases, relied on by the Court below, treat the existence of

[7] J. M. Huber Corp. v. Fed. Power Comm. (CA3, 1956) 236 F. 2d 550, Cert. Den. 352 US 971.

jurisdictional facilities as a matter of *fact* proper for determination in the first instance by the Commission. In *Federal Power Commission* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498 (1949), this Court declared in unmistakable language that Section 7(b) did not operate on facilities embraced within the Section 1(b) exemption. Holding that the Commission could not prevent or control the transfer of leases, it said:

> "* * * The argument here is that since natural gas is the 'lifeblood' of a pipe-line system, a company by disposing of its gas reserve, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. The section, like those above, covers only 'facilities subject to the jurisdiction of the Commission'" (at page 509).

Petitioner operated only production facilities; his deliveries of gas to Southern Natural under the 1947 Contract were made through a separator situated at the well head (R. 15, 52). The original application for a certificate of convenience and necessity was specific in its exclusion of request for authorization to operate such facilities (R. 54). This Court has frequently held certification of producer facilities was not required because of the "production and gathering" exemption of Section 1(b). The holding in *Phillips* was so characterized by the dissent:

> "By today's decision the Court restricts the phrase 'production and gathering' to 'the physical activities, facilities and properties' used in production and gathering" (347 U.S. at page 695).

To like effect are *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 518 (1945); *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682 (1947);

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

The necessity of this exemption is apparent from the practical impossibility of the Commission's making routine business decisions on locating, drilling, testing, completing, deepening, reworking gas wells and, if economically necessary, abandoning them and other production facilities. The Commission is neither equipped nor charged with responsibility of acting as a Super Board of Directors, to review the business judgment of its regulated producers in this area. As Petitioner operated only production facilities, his sales under the terminated contract could not involve facilities or service for which he was required to obtain a certificate to place into service or authorization to withdraw from service.[8]

Until the *Continental* and *Sun*, et al, decisions, the Court below had been in accord. In *Deep South Oil Co.* v. *Federal Power Commission* (CA 5, 1957), 247 F. 2d 882, cert. den. 355 U.S. 930, it has said:

> "The exemption of production and gathering facilities merely means that the physical activities, facilities and facilities used by Petitioner in the production and gathering of natural gas are not within the Commission's power of regulation."

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[8] While other sections of the Act relate to "sales" and "service", Section 7(b) applies only to "facilities" and "service". It contains no mention of sales. Attempts to increase its scope to embrace producer sales have failed. Amendment to Section 7(b) was proposed by letter dated June 17, 1955 from Chairman Kuykendall, Federal Power Commission, to the Chairman of the Senate Committee on Interstate and Foreign Commerce, the purpose of which was to make clear "* * * that Commission is authorized to pass upon the proposed abandonment of any sales in interstate commerce for resale by independent producers". See, Hearings, 84th Cong. 1st Sess. on S. 712, et al, pp. 1234, 1235. No such bill was passed. This Court's reasoning in *Phillips* is no less applicable here. 347 U.S. at page 685.

The resulting intracircuit conflict on a matter of such importance is a further compelling reason for the granting of certiorari. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 508; *John Hancock Mutual Life Insurance Co.* v. *Bartels*, 308 U.S., 180, 181.

(d) Act Adequate as Written:

It is the view of the dissent (shared by Petitioner) that the decision below is born of the majority's apprehension that the Act does not otherwise provide adequate protection for the public. It is argued that producers should not be permitted by contract to dictate the terms and conditions of each certificate issued by the Commission. To obviate this phantom defect, the majority stretches Section 7(b) over what it considers to be a hiatus in the Act. In so doing, it rejects the contract and ascribes to the Commission powers which the Act does not confer. The Act as written is adequate to the occasion.

The Commission is vested with sufficient conditioning powers to interdict at the outset any fictitious agreements — agreements of artificially short duration, or which contain other offensive provisions. If a sale (or service) proposed and evidenced by the contract is not required for the present or future public convenience and necessity, the application should be denied. Section 7 affords the Commission review powers at the initial stage of sales or operations. Sections 4 and 5 in complementary manner provide for review during the course of sales or operations. The Commission's power to condition certificates is recognized as necessary to assure that privately negotiated agreements meet standards of public responsibility. The Commission may, no doubt does, and should, use its conditioning powers to nudge contracting parties gently into

a position consistent with the public interest. Sections 4, 5, and 7 of the Act thus afford a comprehensive scheme of supervision over regulated sales and operations from their inception through their conclusion.

Once the underlying agreement has been reviewed by the Commission, accepted for filing and made public under Section 4, all interested parties may rely on its provisions until they are changed in the manner prescribed by the Act. Having once committed himself by contract to serve for a particular period of time or on particular terms, an applicant would be prevented by Sections 4 and 5 from terminating without just cause the sales and services assumed by him. Likewise, mutual consent to change between parties, such as subsequent shortening of the contract term, would be inoperative until notice was given under Section 4 and Commission review, if determined to be necessary, was obtained. To hold as the court below has, that Section 7 of the Act eradicates the term provision from a private contract which has been accepted and performed to conclusion, creates a conflict between Sections 7 and 5 and disrupts efficient administration under the Act.

II.

PETITIONER WAS WRONGFULLY DENIED THE HEARING ON HIS CERTIFICATE APPLICATION GUARANTEED BY SECTION 7 OF THE ACT.

Express provision is made in Section 7(c) to assure hearings on applications for certificates. The language of that Section is mandatory. Upon the filing of an application, the Commission "shall set the matter for hearing". Attempts to shortcut this requirement have consistently failed. Cf. *Mississippi River Fuel Corp.* v. *Federal Power*

Commission (CA 3, 1953) 202 F. 2d 899, pet. for cert. dis'm. 345 U.S. 985; *Northeastern Gas Transmisssion Co.* v. *Federal Power Commission* (CA 3, 1952) 195 F. 2d 872, cert. den. 344 U.S. 818. The wisdom of the hearing requirement is demonstrated here.

The court below adopted the reasons assigned by the Commission for its summary rejection of Petitioner's certificate application. It concluded that rejection without hearing was proper where there was an operative certificate duplicating the one for which Petitioner had applied. *If the view of the Court and Commission is correct that the certificate is not limited by the language of the application, the question of "duplication" is clearly one for determination after hearing.*

Petitioner was denied the opportunity to show that the "outstanding" certificate (upon which the Court below based its decision) was inoperative; that by its own terms it did not cover the same proposed sale of gas to Southern Natural; that the scope of the second contract was distinctly different from that of the expired agreement; that it was *in fact* for new sales (or service) at the agreed initial rate; that termination of deliveries under the expired contract had lawfully brought the first certificate to a conclusion; and that a new certificate application was, therefore, not only proper, but was required by the Act. Petitioner was further deprived of the right to show the *fact* that all facilities which he employed and operated in producing the gas and effecting the contract deliveries were "production facilities" exempt from the abandonment limitations of Section 7.

The Commission, apparently having assumed that the hearing could result only in adverse findings to Petitioner, ordered summary rejection. The dissent of Commissioner Digby, suggest only one of several salient matters of fact

and issues of construction which the Commission would be called upon to consider — matters properly presented first to the Commission. Rejection without hearing prevented Petitioner from making a full record on his application. Unless this Court corrects, the procedure adopted by the Commission and sanctioned by the majority below may be expected to replace that guaranteed by the Act.

CONCLUSION

This Court has long held that the power to compel continuity in a business can arise only where the obligation of continued service by the owner is direct and is assumed when the business is entered upon. *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923). Under the opinion below Petitioner is charged with the burden of continuing production and sales of gas to Southern Natural from his Gwinville Field properties *ad depletum productae*. His contract is ignored. The general applicability of this decision and its misapplication of Section 7 of the Act require full review by this Court. It is, accordingly, urged that a writ of certiorari be issued to review the judgment of the Court below.

Respectfully submitted,

.....

GENE M. WOODFIN
11th Floor, Esperson Building
Houston 2, Texas
Attorney for Petitioner.
S. W. Richardson

Of Counsel:
J. EVANS ATTWELL
JAMES W. McCARTNEY
VINSON, ELKINS, WEEMS & SEARLS
11th Floor, Esperson Building
Houston 2, Texas

FILE COPY

FILED

No. 208

Supreme Court of the United States

OCTOBER TERM, 1959

S. W. RICHARDSON,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GENE V. WOODFIN
11th Floor, Esperson Bldg.
Houston 2, Texas
Attorney for Petitioner,
S. W. Richardson

J. EVANS ATTWELL
JAMES W. McCARTNEY

VINSON, ELKINS, WEEMS & SEARLS
11th Floor, Esperson Building
Houston 2, Texas
Of Counsel

BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

TABLE OF CONTENTS

	PAGE
1. Opinion of the United States Court of Appeals for the Fifth Circuit, dated April 17, 1959, in No. 17049, styled S. W. Richardson, Petitioner, v. Federal Power Commission, Respondent	1a
2. Judgment of the Court of Appeals for the Fifth Circuit, dated April 17, 1959, in No. 17049, styled S. W. Richardson, Petitioner, v. Federal Power Commission, Respondent	3a
3. Opinion of the United States Court of Appeals for the Fifth Circuit, dated April 17, 1959, in No. 17040, styled Sun Oil Company, Petitioner, v. Federal Power Commission, Respondent	4a
4. Dissent of Judge John R. Brown in No. 17049 styled S. W. Richardson, Petitioner v. Federal Power Commission, Respondent	12a
5. Opinion of the United States Court of Appeals for the Fifth Circuit, dated April 17, 1959, in No. 17016, styled Continental Oil Company, Petitioner, v. Federal Power Commission, Respondent	25a
6. Dissent of Judge John R. Brown in No. 17016 styled Continental Oil Company, Petitioner v. Federal Power Commission, Respondent	33a
7. Letter order of the Federal Power Commission in Docket G-13272, styled S. W. Richardson, et al, dated October 3, 1957	52a
8. Order of the Federal Power Commission denying motion for reconsideration in The Matter of S. W. Richardson, Docket G-13272, issued November 27, 1957	54a
9. Provisions of the Natural Gas Act (Act of June 21, 1938 c. 556.52 Stat. 821, as Amended, 15 U.S.C. 717, et seq.):	
Section 1(b)	58a
4(a)	58a
4(b)	58a
4(c)	58a
4(d)	59a
4(e)	59a

PAGE

Section 5(a) 61a

5(b) 61a

Section 7(a) 61a

7(b) 62a

7(c) 62a

7(d) 64a

7(e) 64a

Section 19(b) 64a

8. Regulations of the Federal Power Commission Under the Natural Gas Act:

No. 154.94 ..... 66a

No. 157.28(c) 68a

No. 157.29 ..... 68a

9. Rules of the Federal Power Commission:

Rule §1.32(b) 69a

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17049

S. W. RICHARDSON,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

(April 17, 1959.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: This is a companion case to the four cases decided today which are styled *Sun Oil Company* v. *Federal Power Commission, No. 17040; Humble Oil & Refining Company* v. *Federal Power Commission, No. 17128; Hunt Oil Company* v. *Federal Power Commission, No. 17256;* and *Magnolia Petroleum Company* v. *Federal Power Commission, No. 17136.*

The factual situation is here different from the other cases in that, when Richardson's filing of the new contract as an initial rate schedule was rejected and his application for a new certificate was likewise rejected he appealed from

the Commission's orders. He did not, as did the petitioners in the companion cases, make an alternative filing of the new contract as a rate change. This difference does not require the application of any different principles than those upon which our decision was based in *Sun Oil Company v. Federal Power Commission*, *supra*. For the reasons assigned in the opinion in that case, the orders of the Federal Power Commission are

AFFIRMED.

BROWN, Circuit Judge, dissenting:

For dissenting opinion see *Sun Oil Company* v. *FPC*, 5 Cir., 1959, ... F. 2d ..... [No. 17040; printed in slip opinion jointly as the separate dissent in each of cases Nos. 17040, 17049, 17128, 17136, 17256].

JUDGMENT

Extract from the Minutes of April 17, 1959.

No. 17049

S. W. RICHARDSON,

v.

FEDERAL POWER COMMISSION.

This cause came on to be heard on the petition of S. W. Richardson for review of orders of the Federal Power Commission issued on October 3, 1957 and November 27, 1957 in Docket No. G-13272, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, affirmed.

"BROWN, Circuit Judge, dissenting."

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17040

SUN OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

(April 17, 1959.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Sun Oil Company, herein called Sun, made a contract bearing date August 26, 1947, with Southern Natural Gas Company, herein referred to as Southern, for the sale to the latter of natural gas to be produced by Sun from the Gwinville Field in Mississippi. The contract provided that it should be in effect for ten years commencing on the date of the first delivery of gas by Sun to Southern. This date was September 3, 1947. The contract provisions as to price were in these terms:

> "Subject to the provisions of Article VI hereof, providing for a possible adjustment in price, Buyer agrees to pay Seller for all gas purchased hereunder a price

(1) of seven and one-half cents (7½¢) for each one thousand (1,000) cubic feet of gas during the first five (5) years of the term hereof;

(2) of eight cents (8¢) for each one thousand (1,000) cubic feet of gas during the second five (5) years of said term."

Immediately following the foregoing was this proviso:

"In this connection, it is understood that by this agreement Seller is not dedicating to Buyer, or to Buyer's market outlet, any portion of Seller's gas reserves in the Gwinville Gas Field or any portion of the gas produced by Seller from its wells in said field, but that Seller is simply selling and Buyer is purchasing the quantity of gas called for in this agreement on the terms specified in this agreement and for the price set out above; * * *."

Subsequent to the *Phillips Petroleum* case,[1] decided on June 7, 1954, the Federal Power Commission supplemented the provisions of the Natural Gas Act, 15 U.S.C.A. § 717 et seq., by issuing its so-called No. 174 series of orders[2] which required independent producers of natural gas to file rate schedules and apply for certificates of public convenience and necessity. Sun applied for and procured a certificate of public convenience and necessity authorizing the sale of natural gas to Southern. It filed the contract as a rate schedule under Section 4 of the Natural Gas Act.[3]

Prior to the termination of their agreement Sun and Southern made a new agreement in 1957 which was to become effective upon the expiration of the 1947 agreement. This provided for continued deliveries of gas in the same field and with the same facilities. The contract was,

[1] Phillips Petroleum Company v. Wisconsin, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, 3 P U R 3d 129.
[2] 18 C F R §§ 154.91-154.102, §§ 157.23-157.31.
[3] 15 U.S.C.A. § 717 c.

for the most part, substantially the same as that which it succeeded. The primary difference was an increase from 8¢ per Mcf to 20¢ per Mcf of gas. Sun then applied, under the new contract, for a new certificate of public convenience and necessity and filed the new contract as an initial rate schedule. The Commission rejected the application and filing on the ground that, the same service being involved, any new certificate would merely duplicate the earlier certificate which was still effective and outstanding and the proposed rate filings were of rate changes rather than initial rate filings. Protesting the Commission's order and reserving its right to contest it, Sun resubmitted the 1957 contract as a rate change. The Commission then, as is authorized by Section 4 of the Act, suspended the effectiveness of the rate change for the statutory period of five months. At the expiration of the five-month period, the 20¢ rate was placed in effect and Sun undertook to make such refunds as might be required. Sun has petitioned this Court to review the order of the Commission rejecting the application for a certificate and an initial rate filing, and the order suspending the rate change. Although a number of specifications of error are made, most of them are hinged upon the proposition that the rate set forth in the new contract was an initial rate filing, and the collateral doctrine that the certificate of public convenience and necessity which was originally issued had expired and become functus officio upon the date fixed for the expiration of the first contract by its terms.

It is "rates and charges" that are subject to regulation.[4] The method of filing and regulating rates has thus been succinctly stated.

> "The act requires natural gas companies to file all rates and contracts with the Commission (§ 4(c)), and

[4] Natural Gas Act § 4(a), 15 U.S.C.A. § 717c (a).

authorizes the Commission to modify any rate or contract which it determines to be 'unjust, unreasonable, unduly discriminatory or preferential' (§ 5(a)). Changes to previously filed rates or contracts must be filed with the Commission at least 30 days before they are to go into effect (§ 4(d)), and, except in the case of industrial rates, the Commission may suspend the operation of a new rate pending a determination of its reasonableness (§ 4(e)). If a decision has not been reached before the period of suspension expires, a maximum of five months, the filed rate must be allowed to go into effect, but the Commission's order may be made retroactive to that date." *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373; 12 P U R 3d 112.

In the *Mobile* case United was obligated by contract to furnish gas to Mobile at a fixed rate during the contract period of ten years. There was no provision for any different rate nor was there any provision made for changing the rate during the contract term. United undertook to effect a rate increase by filing a new rate schedule with the Commission. It was held that the Natural Gas Act gave no power to put unilateral rate increases into effect, and that United could procure a rate increase, if at all, only by an order of the Commission entered in a proceeding under Section 5 of the Act.

It is urged that the decision in Mobile recognizes a freedom of contract in rate making applicable alike to new contracts and to renewal contracts. The "philosophy of Mobile", as it is referred to, is such as to require, it is contended, a holding that when a contract has, by the law of contracts, terminated, the parties are permitted to fix rates for the continued service, free from Section 4 regulation, in the same manner that might have been done before

the passage of the Act. We do not think the doctrine of Mobile applies in a situation such as is before us here. In *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103, 79 S. Ct. ....., 3 L. Ed. 2d 153, reh. den. 358 U.S. 942, ... S. Ct. ....., 3 L. Ed. 2d 350, it was held that Section 4 procedures were available where rate increases were proposed pursuant to a "going rate" provision in the contract. The purpose of Congress was carried out in framing its regulatory scheme "not only by preserving the 'integrity' of private contractual arrangements for the supply of natural gas, * * * (subject of course to any overriding authority of the Commission), but also by providing in Section 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate review." 358 U.S. 114.

The same doctrine has been applied where the contract contained a "favored nation" clause and it has been held that rate increases under such a clause are subject to Section 4 of the Act. *Mississippi Power & Light Co. v. Memphis Natural Gas Co.*, 5th Cir. 1947, 162 F. 2d 388, 71 P U R N S 182, cert. den. 332 U.S. 770, 68 S. Ct. 82, 92 L. Ed. 355. So too it has been held that rate increases pursuant to the escalator clause of a contract which predated the Phillips decision of June 7, 1954, were rate changes subject to Section 4 of the Act and not initial rates subject to Commission review only under Section 5 of the Act. *Bel Oil Corporation v. Federal Power Commission*, 5th Cir. 1958, 255 F. 2d 548, 24 P U R 3d 512, cert. den. 358 U.S. 804, ... S. Ct. ....., 3 L. Ed. 2d 76. It necessarily follows that where, upon the termination of a contract fixing a rate which was the subject of an initial rate filing with the Commission, a new contract is made between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change and subject to

the provisions of Section 4 of the Act, including the provisions relating to the suspension of the rate. The rate fixed by the new contract is not an initial rate which could be changed only by order of the Commission in a proceeding under Section 5.

The foregoing disposes of the principal question presented. Other questions remain. The Petitioner contends that since its certificate originally issued authorized the sale by it of natural gas "as more fully described in the application and exhibits", and since the certificate was issued under an order providing that the certificate "shall be effective only so long as the Applicant continues the acts or operations hereby authorized," it must follow that the certificate expired with the contract and the rejection by the Commission of the application for a new certificate was invalid. This contention is based upon a misconception of the purpose and effect of the certificate. The authorization of the certificate is not only for the sale of gas pursuant to the contract but pursuant to and subject to the provisions of the Act and regulation pursuant thereto by the Commission. The Commission has the power under Sections 7 (c) and 7 (e) of the Act, 15 U.S.C.A. § 717 f (c), (e), to issue certificate of public convenience and necessity of limited duration. *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 353 U.S. 944, 77 S. Ct. 792, 1 L. Ed. 2d 794, 18 P U R 3d 320. Whether, in this case, the Commission could have granted a certificate limited to the life of the contract, without abusing its discretion, need not be decided. We find nothing to show any intent of the Petitioner to apply for a limited or conditional certificate, nor do we find anything to indicate that the Commission intended to limit its certificate. The matters to which the Petitioner points do not permit of the inference which it would have us draw.

The Petitioner asserts that because of the rejection of the application for a second certificate without a hearing after notice there was a violation of the administrative requirement of Section 7 (c) of the Act, 15 U.S.C.A. § 717 f (c). The Petitioner makes a like contention with respect to the rejection of its second contract as an initial rate filing. Where, as in this case, there could be no right to have a certificate of public convenience and necessity issued which duplicated a certificate outstanding and operative; and where, as here, the second contract was a nullity as an initial rate filing, it was proper to reject them without notice and without a hearing. Cf. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*, *supra*.

The Commission suggests that the orders which Sun brings before us for review are interlocutory and that administrative remedies have not been exhausted. To support this view reliance is placed upon *Shank, Trustee*, v. *Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 830, 15 P U R 3d 408, cert. den. 352 U.S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 324, and *Lee, Trustee*, v. *Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 835, cert. den. 352 U.S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 323. In the cited cases the orders were mere procedural steps in the administrative process. The orders which we here review are "of a definitive character dealing with the merits of a proceeding before the Commission and, as such, are reviewable under Section 19(b) of the Act, 15 U.S.C.A. § 717 r (b). *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 58 S. Ct. 963, 82 L. Ed. 1408, 24 P U R N S 394; *Magnolia Petroleum Co.* v. *Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 785, 15 P U R 3d 364, cert. den. 352 U.S. 968, 77 S. Ct. 356, 1 L. Ed. 2d 322. We see no need for the holding of a formal hearing and the taking of testimony where no fact issue was presented. Although the orders before us

are, in a sense, procedural and interlocutory, they make a final disposition of questions of grave importance in the natural gas industry. The orders were formal determinations of rights of the petitioners and the effect of the orders was not contingent upon future administrative action. We have no doubt that these orders should be passed upon by this Court.

Sun urges that its contractual relationship with Southern is only for the sale of natural gas, that it engages in no service and renders no service, that it does not propose to abandon any facilities, that it has no facilities subject to the Commission's jurisdiction and hence it is not subject to Section 7 (b) of the Act, 15 U.S.C.A. § 717 f (b). Our decision in *Continental Oil Company* v. *Federal Power Commission*, ... F. 2d ....., decided this day, is controlling on this issue. A like contention was made before the Court of Appeals for the Third Circuit and its well reasoned conclusions are contrary to the position urged by Sun. *J. M. Huber Corporation* v. *Federal Power Commission*, 3rd Cir. 1956, 236 F. 2d 550, 15 P U R 3d 434, cert. den. 352 U.S. 971, 77 S. Ct. 363, 1 L. Ed. 2d 324. The principles there announced are sound and are applicable here. The decision of this Court in *Deep South Oil Company of Texas* v. *Federal Power Commission*, 5th Cir. 1957, 247 F. 2d 882, 20 P U R 3d 469, is not in conflict.

It follows that the Commission's orders should be and hereby are

AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17040

SUN OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

No. 17049

S. W. RICHARDSON,

Petitioner.

v.

FEDERAL POWER COMMISSION,

Respondent.

No. 17128

HUMBLE OIL & REFINING COMPANY,

Petitioner.

v.

FEDERAL POWER COMMISSION,

Respondent.

No. 17136

MAGNOLIA PETROLEUM COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

No. 17256

HUNT OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Before TUTTLE, JONES and BROWN, Circuit Judges.

BROWN, Circuit Judge, dissenting:

I am in full agreement with the Court that the orders are reviewable. I also accept, as binding on me, our prior decision in *Bel Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F. 2d 548, cert. denied 358 U.S. 804, ... S. Ct. ....., 3 L. Ed. 2d 76, holding that an automatic stepped-up escalator increase is a change of rate. I do that even though that decision was based primarily on our earlier one of *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 5 Cir., 1947, 162 F. 2d 388, cert. denied 332 U.S. 770, 68 S. Ct. 82, 92 L. Ed. 355,

which in turn was pronounced in the pre-*Mobile* era when all thought that contracts of a natural gas company, as in the case of any other public utility, were subject to an overriding public regulation. *Mobile* accorded almost absolute sanctity to the private contract and rejected, without so much as a deferential footnote citation, the traditional and contrary concept of which *Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 1919, 248 U.S. 372, 39 S. Ct. 117, 63 L. Ed. 309, was the symbol as well as the *cause celebre* around which the controversy raged before the Commission and the Third Circuit. 215 F. 2d 883, 886.

But in the face of *Mobile* and what it teaches, I think the Court's substantive action affirming the Commission disregards the limited nature of the jurisdiction of the Federal Power Commission, ignores the special and decisive relevance of contract terms, and does all of this without a hearing. I cannot acquiesce in this and must therefore, with deference, dissent.

I.

At the outset I think it well to point out that in reality there is but one basic question. To split it up into apparently separate issues concerning the scope of the Certificate, the change of rate in the contract, or potential abandonment of service "facilities" really only confuses. That is so because these essentially beg the question. For example, if the new contract and its new price is a change of rate, then obviously, it is not an initial rate and it must be filed under Section 4(d) subject to supervision and rebate. If the "sale" is something apart from the contract which alone brought it about, so that it must continue after the contract has completely expired by its own terms, then no new Certificate is required, the original one is sufficient, and the new application should be denied. On the other hand, if the

power of the Commission over the producer is limited to the "sale" reflected by the contract, then the grant of authority expired with the sales contract, so that a new Certificate would be required since all agree it is illegal to sell or transport or render service without a Certificate. Likewise, on that assumption, the old having expired, all there is is now new, and the new contract would be an initial rate subject only to §5 review and not to §4 interim suspension and rebate.

Each of these things results depending on the basic decision. But none is really a reason *why*.

I submit that a careful reading of the Court's opinion reflects that it finds no real reasons, and in the final analysis what it does, as it has done in *Continental Oil Co.* v. *FPC*, 5 Cir., 1959, ... F. 2d ..... [No. 17016], this day decided, is to arrive at its decision out of the conscientious belief that regulation is otherwise ineffectual. I would be the first to think that we could legislate interstitially, but that hardly includes engraftment or transplanting of a congenitally missing organ. If the supposed adverse results apprehended would occur, which I doubt, then Congress, not this Court, should be the surgeon.

II.

The Court, after pointing out that we have held that during the life of an *existing contract*, an increase in price from the operation of a most-favored-nation's clause and from an automatic stepped-up escalation clause are rate changes subject to §4 review, then sets forth as its sole reason which "disposes of the principal question presented" this language:

> "It necessarily follows that where, upon the *termination* of a *contract* fixing a rate which was the subject of an initial rate filing with the Commission, a *new*

contract between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change and subject to the provisions of Section 4 of the Act, including the provisions relating to the suspension of the rate. The rate fixed by the *new contract* is not an initial rate which could be changed only by order of the Commission in a proceeding under Section 5." (emphasis supplied)

Except for the imprimatur of this Court which states that it is *law*, I do not at all think it follows, either normally or naturally or *necessarily*, that "upon the *termination* of a contract" a "*new* contract between the same parties" is a rate change. To reason from *existing* contracts to entirely *new* ones after termination is a non sequitur flying in the face of *Mobile*.

The jurisdiction of the Commission is limited. The act at one end excludes all that is encompassed within production and gathering and, at the other end, the distribution and sale of it to the local consumer. §1(b). It does not undertake to regulate the "business" of natural gas. "Three things and three things only Congress drew within its own regulatory power delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. • • •" *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498, 503, 69 S. Ct. 1251, 93 L. Ed. 1499.

As these producers are not engaged in transportation, the sole basis for jurisdiction is the *sale* for resale. For "until there is a sale of the natural gas produced by such operations and installations in interstate commerce for resale, they are exempt. In the event of such sale the juris-

diction of the Commission applies but only because of the sale and only to the extent that the Natural Gas Act confers jurisdiction." *Saturn Oil & Gas Co.* v. *FPC*, 10 Cir., 1957, 250 F. 2d 61, cert. denied 355 U.S. 956, 78 S. Ct. 542, 2 L. Ed. 2d 532.

The *sale* is therefore vital. It is the alpha. Can this Court be right by holding that there is no omega?

This is important especially in view of the cyclonic case by case development under the Act subjecting the owner of a gas well to the awesome obligations of an orthodox utility despite the obvious "• • • fact that producers are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." *Gulf Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F. 2d 556.

Local distributors cannot get natural gas without transmission lines. Transmission companies cannot obtain the needed astronomical financing unless the entrepreneurs have long-term commitments by distributors to take, and by producers to supply, the gas. Despite the fact that the long-term supply contract must deal with unknown economic factors of a kind which would ordinarily permit a commodity owner to provide an ascertainable but adjustable formula to determine price, we have held that such agreed adjustments are rate changes. *Bel Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F. 2d 548. When such increase or "rate changes" are sought, the producer must satisfy the standards prescribed by the Commission to determine whether the rate will be "just and reasonable." §4(a). *Forest Oil Co.* v. *FPC*, 5 Cir., 1959, ... F. 2d ..... [No. 16844]. To whatever extent any part of the producer's physical equipment serves to effectuate the sale or contain the gas at the point of sale delivery, it becomes a "facility" prohibiting abandonment of any "service" performed thereby. *Continental Oil Co.* v. *FPC*, 5 Cir., 1959, ... F. 2d ..... [No. 17016].

I do not believe that Congress ever intended that the moment the first cubic centimeter of gas started its irrepressible journey from the bowels of the earth to a Brooklyn burner-tip, the gas well owner had committed himself and his commodity irrevocably either to the purchaser of the life and death regulatory power of a remote agency.

III.

How was this likelihood to be avoided? Herein lies the explanation for stating the *grant* of power, and hence its *limitation*, in terms of *sale*. Power was not prescribed, as it might have been, in terms of "service," or the "furnishing," or the "supplying" of gas. What was required was a *sale*. This was a term having both an industry-gas-business relevance and a meaning readily understood by Congress. Despite the awkwardness which arises from the *Phillips* retrospective infusion of a general Congressional purpose to regulate sale by producers which the Commission and others for sixteen years thought to be nonexistent, this was as though Congress spelled out this policy: a producer need not sell for resale in intersate commerce: if he makes a sale, he will, for the duration of that sale, be subject to public utility regulation; when that sale is completed, he will then have the opportunity to reassess his position and determine whether he will cease production, sell in intrastate commerce, or make a new sale for resale in interstate commerce. In this way there was some practical adjustment of the conceptual difficulties involved in subjecting, for the first time in the nation's history, the owner of an exhaustible natural resource to a limited regulation.

IV.

I would quickly emphasize that I do not think that stating Commission jurisdiction in terms of *sale* inevitably ties jurisdiction to all of the refinements of the law of sales

But if, as this Court concludes — erroneously I think — that Congress used "production" in its everyday sense, *Continental Oil Corp* v. *FPC*, 5 Cir., 1959, ... F. 2d ....., ... [No. 17016], then it is an understatement to say that it certainly must have had in mind the usual connotations of a word and term so well understood and so much used as "sale." In this light, it meant at least a relationship growing out of a contract. "'[S]ale' is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties, to give and to pass rights of property for money — which the buyer pays or promises to pay the seller for the thing bought and sold." *Williamson* v. *Berry*, 1850, 49 U.S. (8 How.) 495, 544, 12 L. Ed. 1170. *Curtis* v. *O'Leary*, 8 Cir., 1942, 131 F. 2d 240; 77 CJS, Sales, §1, at 575 (1952).

There are four main elements to a sale, which is to say a contract, express or implied, of sale: (1) a seller and a buyer; (2) a commodity or service; (3) a price or consideration; and (4) a quantity or time. We know for certain that the Commission cannot order an involuntary sale by a producer to a pipe line, so element (1) is fixed by the parties. The gas producer is unlike the traditional public utility whose holding out binds him to serve all on common terms. Element (2) is confined to gas with the possible expansion into the area of a service facility. We likewise know for an absolute certainty from *Mobile*, that the Commission cannot prescribe the price. This, too, is left to the parties subject only to a right to review by a hearing and on evidence under §5. That takes care of element (3). On what basis, other than the insupportable one of judicial-administrative necessity can the Commission prescribe element (4) — that is, the *amount* of the commodity to be sold, whether expressed in terms of total quantity, or quantities for a stated term?

If the *amount* of the commodity, element (4), is thought of in terms of the *quantity* to be delivered, we know for a certainty that the Commission could not order a producer to deliver *more gas* than contracted for. This is so because, whatever else may be the vagaries of the §1(b) production and gathering exclusion, the Commission lacks power to order more production. It could not, for example, compel a producer to rework a sickly well, explore a new horizon, attempt to exploit and tap a new reservoir, much less drill an additional well in order to permit, under state conservation laws, an increase in allowable production and hence deliveries to the pipe line purchaser. This prohibition is so far-reaching that the Commission even lacks the power to order an increase in *transportation* facilities because this would indirectly compel an increase in production. *Panhandle Eastern Pipe Line Co.* v. *FPC*, 3 Cir., 1953, 204 F. 2d 675. See also *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498, 504-505, 69 S. Ct. 1257, 93 L. Ed. 1499; *Colorado Interstate Gas Co.* v. *FPC*, 1945, 324 U.S. 581, 598, 65 S. Ct. 829, 89 L. Ed. 1206; *FPC* v. *Hope Natural Gas Co.*, 1944, 320 U.S. 591, 612-615, 64 S. Ct. 281, 88 L. Ed. 333; *Phillips Petroleum Co.* v. *Wisconsin*, 1954, 347 U.S. 672, 678, 74 S. Ct. 794, 98 L. Ed. 1035; *Interstate Natural Gas Co.* v. *FPC*, 1947, 331 U.S. 682, 690, 67 S. Ct. 1482, 91 L. Ed. 1742.

Of course if the Commission cannot compel an increase in quantity deliverable under a contract, it may not do so by enlarging the period of *time* during which such deliveries are to be made. The result is the same. The impact is the same. In each case the Commission's order would be ineffectual unless *more* gas were produced, and this is forbidden territory to the Commission.

V.

The Supreme Court makes two things clear. First, private contracts underlie the whole scheme of regulation. Second, such private contracts give way only by determination of the Commission made after notice, hearing and order. This basic approach pervades all said and done in *Mobile*.

> "The Natural Gas Act * * * recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules. * * * By preserving the integrity of contracts, it [the Act] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. * * * [T]he Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public. * * * Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act, is either power defined. The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the act." 350 U.S. at 339, 343, 344, 345. See also *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 1958, ... U.S. ....., ... S. Ct. ....., 3 L. Ed. 2d 153.

VI.

Both expressed in the briefs of the Commission, and unexpressed but implicit in the Court's opinion, is the apprehension that administrative regulation would be thwarted if parties can prescribe the term (i.e., quantity) of the contract. Assuming that this is for us, rather than the Con-

gress, there are at least three answers. First, we are not here dealing with purported contracts of short and artificial duration. All of the contracts were for the substantial term of 10 years. History has proved that they were genuine and were applied in good faith. Second, the new contracts are likewise of substantial duration. Even more so, because their terms are 20 years. This means that the "new" contracts are substantially different. They are not, as claimed, for the same service but only at a different price. One committing himself for two decades instead of 10 years not only to make the sales but to automatically submit himself to extensive Commission regulation during that period has done much more than simply renew a prior engagement. Third, there are now sufficient administrative tools to prevent any abuse of the accepted purpose of the Act through the spurious device of artificially short contract terms, or any other means by which parties attempt to create the appearance of a firm contract, but which is in the fact but a paper transaction.

On the latter the Commission may grant a certificate of limited duration. *Sunray Mid-Continent Oil Co.* v. *FPC*, 10 Cir., 1956, 239 F. 2d 97, reversed per curiam 353 U.S. 944, 77 S. Ct. 792, 1 L. Ed. 2d 794. Conversely, it may grant them without limitation. As a condition to granting the initial Certificate, the Commission can determine whether the proffered contract is genuine and binding for a substantial period of time. If it thinks it not, it may decline the issuance of the Certificate. If, as these cases present, a "new" Certificate is requested for the "new" contract, the Commission can again look at it. Unless the proposed contract subjects the producer to substantial obligations permitting effective regulation for the future, the Commission may decline the Certificate.

All it may not do is force a producer either to produce *more* gas, or sell *more* gas, or sell *more* gas for a longer time. If that is to occur after the expiration of the initial contract, it may be done only upon application of the parties pursuant to a new agreement. The Commission still has the last check since the condition for the grant of the new Certificate may be alteration in the terms of the agreement.

VII.

Finally, all of this has come about with no hearing, with no opportunity for hearing, and with an absolute refusal of the Commission even to receive the various applications for the purpose of a hearing. Section 7(e) prescribes a hearing to determine whether a Certificate should be issued and whether, and to what extent, special conditions ought to be imposed on the grant. Section 7(c) requires that a hearing be held. Whether, and to what extent, the initial contracts were genuine, and whether, and to what extent, the "new" contracts were merely a continuation or something substantially different, involved at least questions of judgment which could not be foreclosed peremptorily by slamming the door shut before it was scarcely opened. *Northeastern Gas Transmission Co.* v. *FPC*, 3 Cir., 1952, 195 F. 2d 872, cert. denied 344 U.S. 818, ... S. Ct. ....., 97 L. Ed. 637; *Mississippi River Fuel Corp.* v. *FPC*, 3 Cir., 1953, 202 F. 2d 899; *Cities Service Gas Co.* v. *FPC*, 10 Cir., 1958, 255 F. 2d 860. The Administrative Procedure Act, 5 USCA §§1001-1011, applicable to the Federal Power Commission, *State Corporation Commission of Kansas* v. *FPC*, 8 Cir., 1953, 206 F. 2d 690, likewise assures a hearing. *Wong Yang Sung* v. *McGrath*, 1950, 339 U.S. 33, ... S. Ct. ....., 94 L. Ed. 616; *Riss & Co.* v. *United States*, W.D. Mo., 1950, 96 F. Supp. 452, rev'd, 1951, 341 U.S. 907, ... S. Ct. ..... 95 L. Ed. 1345.

The peremptory nature of the Commission proceedings which we approve is dramatically demonstrated by the Court's reference to the producer's contentions under 7(b). To the argument of the producer that "it engages in no service and renders no service, that it does not propose to abandon any facilities, that it has no facilities subject to the Commission's jurisdiction and hence it is not subject to Section 7(b) of the Act * * *," the Court holds "our decision in *Continental Oil Company* v. *Federal Power Commission*, ... F. 2d ....., decided this day, is controlling on this issue." Accepting, for the moment, the correctness of our decision in *Continental Oil Company*, that decision deals at length with minute facts concerning a specific well which was the subject of an extensive hearing. In this proceeding, without hearing, without evidence, without knowing whether, in the sense of *Continental Oil Company*, there is any "facility" by which the service is performed, this Court proceeds to declare that the Commission could take similar action.

The joint effect of these opinions today announced is to destroy the last remnant of the 1(b) production and gathering exclusion. By forcing the owner of a natural resource to continue deliveries until the reservoir is exhausted, and to continue the delivery of gas if some piece of equipment effectuates the sale or its containment at the point of delivery, inevitably means that production is in the hands of the Commission. Congress has posted this as off limits to the Commission. Only Congress may make the change. I therefore respectfully dissent.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17016

CONTINENTAL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

(April 17, 1959.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: Continental Oil Company is a natural gas company within the meaning of the Natural Gas Act. It sells the gas produced from a single dry gas well in Lea County, New Mexico, to El Paso Natural Gas Company. In its brief, Continental asserts: "Sale of the gas takes place in the well head. Delivery occurs at the point where the facilities owned by Continental end and the facilities owned by El Paso begin; that is, at the point where the gas enters the 4-inch by 2-inch reducing swage [owned by El Paso] where it is screwed inside the 4-inch master valve [owned by Continental]." Before it reaches this critical delivery point the stream of gas has moved up through the

casing and through two master valves, either of which has the potentiality to shut off completely the flow of gas, but neither of which is designed or suitable to regulate the flow, i.e., increase or decrease it. The top member of the upper master valve is a threaded 4-inch aperture into which El Paso's reducing swage is screwed. This is the point of delivery of the gas to the purchaser, as described by petitioner above. The stream thereafter flows through a T and then through pipes, generally horizontally, to El Paso's meter and valve which controls the flow from the well.

Continental finished drilling the well and constructed part of the "Christmas tree," that is, the flanges and two master valves, and then, by closing the valves, shut off the stream of gas until after the sales contract was made with El Paso some six months later. Thereupon El Paso inserted the reducing swage and attached the T connection above it; the horizontal pipes were connected; Continental's master valves were opened and the flow began, subject thereafter to be regulated by El Paso by the opening and closing of its valves downstream from the above described equipment.

The question here is whether the Federal Power Commission was authorized to find that any of the "facilities" of Continental were subject to its jurisdiction. The question came up by petitioner's filing an application under protest for a certificate of public convenience and necessity accompanied by a petition for a declaratory disclaimer of jurisdiction, followed by an order of the Commission issuing the certificate as to the sale of the gas and also a certificate as to "such portions of the 'Christmas tree' that are owned by Continental and serve to contain the gas at the point of delivery," stating that such facilities "are facilities for effecting the sale of gas in interstate commerce."

In addition to requiring a certificate authorizing the sale of gas by natural gas companies, the Natural Gas Act requires in Section 7(c) a certificate authorizing the construction or extension, acquisition or operation of "any facilities" for the sale of natural gas, subject to the jurisdiction of the commission.[1]

Petitioner based its application for disclaimer on the contention that it has no facilities for sale of natural gas, but if it has they are also facilities of production, and that if any facilities for the sale of gas are also facilities used in the "production or gathering" of the gas the commission could not acquire jurisdiction over them because of the specific exemption of Section 1(b)[2] which provides that, "The provisions of this act shall . . . not apply to . . . the local distribution of natural gas or the facilities used for such distribution *or to the production or gathering of natural gas.*" (Emphasis added.) Although not specifically so providing, the language of this exemption

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[1] Section 7(c) provides as follows:

"(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . ."

[2] This section provides:

"(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

has, as to other types of facilities, been held to cover facilities of production or gathering. See *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 504-505. See also *Deep South Oil Company of Texas v. Federal Power Commission*, 5 Cir., 247 F. 2d 882, 889.

The Commission says that there are facilities here utilized by Continental that are not facilities of production and, alternatively, that even though all facilities of Continental are used for production, nevertheless if they are also essential to effect the jurisdictional sales, such facilities are not within the exemption of Section 1(b). Neither gathering nor facilities for gathering are in issue here; only facilities for production.

We think a strong argument can be made under the alternative proposition in light of the holding by the Supreme Court in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, and the decision of this Court in *Deep South Oil Company of Texas v. Federal Power Commission, supra*. There it was held that the affirmative grant of jurisdiction in Section 1(b) of the Act over interstate sales was not whittled down by the exemption of production and gathering even though it is apparent in those cases that what was there involved was what was considered in the industry to be a part of the gathering operation. It might reasonably be contended that by parallel reasoning the affirmative grant in Section 1(a), coupled with the positive language of Section 7(c) requiring that a certificate be required as to facilities for the sale of gas can no more be nullified by the exemption of production and gathering (which does not expressly include facilities for production and gathering)

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[3] As has been pointed out above, in cases not touching on the precise point there in issue, the courts have held that the exemption language comprehends facilities.

than can the grant of jurisdiction over the sales themselves be nullified by the exemption of production and gathering where the sales are made before production and gathering are completed.[4]

We think, however, that we need not place our decision on this alternative ground. We think, notwithstanding the claimed effect of the expert testimony to the contrary, this record discloses that there are facilities for the sale of the gas that are not facilities of production.

It is not only not disputed by petitioner, but is affirmatively argued by it that the sale of gas is completed in the well head and delivery is made at the point where El Paso's facilities receive it from Continental. It is also undisputed that the gas at the point of sale and delivery is the identical stream of gas that rises in the casing and passes through the first of the two master valves. The lower, or first of the two valves, is designed for the purpose of shutting off the flow unless and until the gas can be utilized. The upper or second valve is mechanically unnecessary to permit this operation. It is part of a normal installation clearly called for by the standard art in the industry to give flexibility in case repairs are needed or there is a failure of the single valve. In the ordinary language of purchase and sale of a product where it is in deliverable form the stream of gas is, in a sense, "produced" at the latest after it has passed through the first master

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[4] For a discussion of the treatment of a local act, see Hartford Electric Light Co. v. F.P.C., 2 Cir., 131 F. 2d 953. In the Deep South case we quoted with approval from Interstate Natural Gas Co. v. F.P.C., 5 Cir., 156 F. 2d 949, 951:

"[The act] is very simply and plainly written. After stating what it shall apply to, it then states what it shall not apply to. Under familiar rules of construction, a negation in or exception to a statute will be construed so as to avoid nullifying or restricting its apparent principal purpose and the positive provisions made to carry them out."

valve. Even including this valve as a facility of production may be argued to be conceptually an anomaly because, physically, production and delivery can be accomplished without any valves at all. We fully recognize that for safety of *operation*, making adequate provision for repairs, etc., the unbroken custom in the industry is to contain the gas by a complex of two valves and associated equipment. This is, of course, also required by the self interest of the producer not to let the gas waste and also by the conversation and regulatory policies of the state; but this does not change the fact that in the *ordinary sense of the terms* production of the gas has been completed at or just above the surface of the ground where it is physically deliverable but then is shut in until delivery commences. But under this contract the sale is not completed then, but is completed by delivery to El Paso at the upper threaded orifice or aperture of the second or upper valve which receives the threaded swage of El Paso. Thus, we need not consider whether the first or lower valve is a facility of production, because it is not contended by the Commission that it is also a facility for the jurisdictional sale. It may therefore be conceded that it is, for the purpose of this case, an exempt facility.

Petitioner contends that the only evidence in the record demands the finding as of a fact that the upper valve is also a facility of production.[5] We think it is fundamental

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[5] The evidence on this point consisted of testimony given on behalf of petitioner by Louis W. Miller as follows:

"Q. Mr. Miller, you state that you have been in the oil and gas business for eight or nine years. Will you state whether or not you are familiar with the meaning of the terms 'produced' and 'production' as such terms are used in the oil and gas industry?

A. Yes, I am.

Q. Will you state the source of your knowledge of the meaning of such terms?

that the construction of the statute cannot be made to depend on such testimony, but rather on the basic facts in the record. These facts, undisputed as they are, we think require the conclusion that, so far as germane to the inquiry here, production, as the term is used in this statute, was complete at or before the passage of the gas through the upper aperture of the upper valve. Our duty here is not to determine what is generally understood in the industry, in the resolution of other relationships, as meant by "production." It is to determine what Congress meant by the term. In making such determination we are faced primarily with the unambiguous and clear intent as construed by the Supreme Court in the Phillips case to regulate these interstate sales. Since it is in line with ordinary non-technical usage, we must give to the terms the meaning that will effectuate and not the one that would frustrate the purpose of the law.

Petitioner contends that the order of the Commission implies that if delivery were made even further upstream, say at a point at the bottom of the well, the commission would have the power to certificate the facilities thus used to effect delivery. We say that if a producer sought to test

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A. I have heard them used many times in the field and in the business, and I have talked with many old-timers who have been in the business for years longer than I have.

Q. Do you know whether the meaning of these terms as used in the oil and gas industry has changed in the last twenty years?

A. From my discussions with the old timers and from the way in which they use such terms, I am certain that the meaning has not changed in that period as such terms are used in the oil and gas industry.

Q. As such terms are used in the oil and gas industry, will you state when gas has been produced or when the production of gas is completed in an operation similar to that which you have described for the Stevens B-7 Unit No. 1 Well?

A. As the terms are used in the industry, the stream certainly is not produced and the production of the stream is not completed until after the stream has passed out of the Christmas tree."

out such such a theory it might then be necessary to determine whether the commission's alternative theory discussed above is valid. Here, in any event, the producer could certainly eliminate any uncertainty which it says exists as to what is meant by the Commission's terminology "such portions of the 'Christmas Tree' that are owned by Continental and serve to contain the gas at the point of delivery" if it should see fit merely to insert a length of pipe of as much as two or three inches to serve as a connector between its upper valve and the reducing swage owned by El Paso. It is little short of fantastic to consider the possibility that the jurisdiction of the Commission over facilities for sale, in light of the importance of such jurisdiction under the right of a natural gas company to terminate its services under Section 7(b),[6] could be made to depend on whether El Paso's swage screws into the top of the upper valve or into a short length of pipe which is owned by Continental and which is screwed into the valve.

What we hold here, consistent with the decision of the Courts of Appeals for the 10th Circuit and the 3rd Circuit in *Saturn Oil Gas Co.* v. *F.P.C.*, 10 Cir., 250 F. 2d 61, and *J. M. Huber Corp.* v. *F.P.C.*, 3 Cir., 236 F. 2d 550, is that the petitioner uses facilities for sale of the gas in commerce to El Paso which are not facilities in production of the gas and that the Commission's order relating to the granting of the certificate must be AFFIRMED.

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[6] The importance of commission jurisdiction of facilities in connection with the right to terminate service, is seen by reference to Section 7(b) of the Act, which provides as follows:

"(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

BROWN, Circuit Judge, dissenting:

In my judgment the Court by this opinion engages in impermissible fact finding for which it has neither statutory warrant nor technical competence. It interprets the Natural Gas Act in terms of what it conceives is necessary effectually to enforce what it deems to be the policy of the law. In doing so it ignores the plain words of Congressional limitation on the basic power of the Federal Power Commission. Worse, it reads out of the Act both these words and the equally emphatic technical meaning ascribed to them not less than three times by the Supreme Court. Apparently from the demands of administrative necessity it reads the word "production" of natural gas as entirely removed from the technical context of the oil and gas business, as though Congress were using it in the colloquial or everyday sense concerning the production of wheat, or corn, or cattle or shirts. Finally, it seems to me to say that since, in the determination of jurisdictional sales, *Phillips Petroleum Company* v. *Wisconsin*, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035, is thought by many to have ridden roughshod over the same exemption, everything fell before that awesome decision even though the subject of our case is not *sales*, but *production* which is the essence and the exact subject of the exclusion.

The law may be imperfect. What Congress has prescribed may be something less than completely effective. But when Congress has spoken in terms of the strongest prohibition that "the provisions of this act • • • shall not apply • • • to the production • • • of natural gas," it is our duty faithfully to apply this exclusion. It is not our province either to ignore these positive terms or gloss over them with some easy construction under any

supposed duty that "we must give to the terms the meaning that will effectuate and not the one that would frustrate the purpose of the law." That purpose is described in the opinion as "the intent * * * to regulate * * * interstate sales."—a statement which is, to say the least, an oversimplification since that purpose is in the very same sentence[1] of the Act which imposes this positive prohibition.

I.

The Court seems preoccupied with the omission of the term "facilities" from the production of natural gas exclusion of Section 1(b). It twice points out that in contrast to the immediately preceding phrase "or to the local distribution of natural gas or to the facility used for such distribution," reference is made to facilities whereas this language is absent in the phrase applicable here, "or to the production or gathering of natural gas." The Court acknowledges, as it must, that this language of the exclusion has been construed expressly to cover *facilities* of production or gathering.[2] But this innocuous and casual presenta-

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[1] Section 1(b) provides:

"(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 15 USCA 717(b).

[2] The Court's opinion states: "Although not specifically so providing, the language of this exemption has, as to other types of facilities, been held to cover facilities of production or gathering. See Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U.S. 498, 504-505. See also Deep South Oil Company of Texas v. Federal Power Commission, 5 Cir., 247 F. 2d 882, 889." And see the parenthetical phrase "(which does not expressly include facilities for production and exemption)" at note 3 call 3.

tion creates the impression that these interpretative decisions, both on the meaning of the term and its general purpose, are of remote and only indirect interest. I do not think they either may or ought to be so quickly dismissed by this deferential curtsy.

I think these interpretative decisions are of critical importance. A brief consideration of them is convincing that the Supreme Court regards the words of the §1(b) exemption as much a part of the Act as the affirmative grant of power.

That "production" included the facilities reasonably required for it has long been settled through the emphatic language of *FPC v. Panhandle Eastern Pipe Line Company*, 1949, 337 U.S. 498, 504-55, ... S. Ct. ....., 93 L.Ed. 1499:

> "The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities, such as reserves and gas leases, used therefor and argues that only the former were excluded from the coverage of the Act. In support of this position it is pointed out that the section specifically exempts both the local distribution and the facilities used therefor while it makes no mention of the facilities used for production or gathering. In the face of the unambiguous language of the Act and its legislative background, we cannot ascribe such a narrow meaning to the words, 'the production or gathering of natural gas.' In Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 603, 65 S.Ct. 829, 839, 89 L.Ed. 1206, we said that this phrase comprehended producing properties and gathering facilities of a natural-gas company. We now adhere to this natural and clear meaning of the words and their obvious expression of congressional intent."

This Court's off-hand suggestion that a "strong argument can be made under the alternative proposition in light of the holding by the Supreme Court in *Phillips Petroleum Company* v. *Wisconsin*" assumes that since the Supreme Court found *sales* not affected by the §1(b) exclusion so that "production" was swallowed up by anything amounting to an "interstate sale" hardly finds support in anything which the Court there said.

> "In Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 505, 69 S.Ct. 1251, 1256, 93 L. Ed. 1499, 1505, we observed that the 'natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses 'the producing properties and gathering facilities of a natural-gas company.' Similarly, in Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 598, 65 S.Ct. 829, 837, 89 L.Ed. 1206, 1220, we stated that '[t]ransportation and sale do not include production or gathering,' and indicated that the 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas. Id., 324 U.S. at pages 602-603, 65 S.Ct. at page 839. See also Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 612-615, 64 S.Ct. 281, 292-294, 88 L.Ed. 333, 350-52; Peoples Natural Gas Co. v. Federal Power Commission, 75 U.S. App. D.C. 235, 127 F. 2d 153; cf. United States v. Public Utilities Commission, 345 U.S. 295, 307-311, 73 S.Ct. 706, 713-716, 97 L.Ed. 1020." *Phillips Petroleum Company* v. *Wisconsin*, 1954, 347 U.S. 672, 678, 74 S.Ct. 794, 98 L.Ed. 1035.

More important, the Court has always regarded the exclusions in §1(b) as absolute prohibitions on basic power in order to effectuate a Congressional purpose not only to cover some areas, but, just as positively, not to cover or intrude upon others:

"Without entering upon another review of its legislative history, suffice it to say that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies. Accordingly, Congress in §1(b) of the Act not only prescribed the intended reach of the Commissioner's power, but also specified the areas into which this power was not to extend.

"• • • • [quoting §1(b)]

"'This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.' Panhandle Eastern Pipe Line Co. v. Public Service Commission, 332 U.S. 507, 516, 68 S.Ct. 190, 195, 92 L.Ed. 128, 137. The Act, moreover, expressly exempts from its coverage (1) any other transportation or sale of natural gas; (2) the local distribution of natural gas; (3) the facilities used for local distribution, and (4) the production and gathering of natural gas." *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498, 502-504, 69 S.Ct. 1251, 93 L.Ed. 1499.

This but echoed the earlier statements in *Interstate Natural Gas Company* v. *FPC*, 1947, 331 U.S. 682, 690, 67 S.Ct. 1482, 91 L.Ed. 1742, 1748:[3]

> "Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters."

The last part of §1(b) is as important as the first. The tail is as important as the head. While the purpose was to regulate interstate transportation and interstate sales of gas, the policy was equally firm that the Commission was to have no power whatsoever over production or gathering of natural gas. The one is as much the Congressional purpose as the other. Congress may act in both an affirmative and negative way. What it means not to cover or invade is frequently as significant as the limited field it undertakes to enter. *Libby, McNeill & Libby* v. *Mitchell*, 5 Cir., 1958, 256 F. 2d 832, 834; *Maneja* v. *Waialua Agricultural Co.*,

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[3] This Court in that same case, 5 Cir., 1946, 156 F. 2d 949, 951, had earlier stated about §1(b) and the Act:

"Unnecessarily perhaps but in the interest of making clear that the act gave jurisdiction only over sales and transportation of the kind described in it, it used language removing from any doubt that the Commission was not to have jurisdiction over properties used for production and local distribution or the activities of production and gathering. It did this by expressly providing that the act should not apply 'to the facilities used for such [i.e. local] distribution or to the production or gathering of natural gas.'"

Just a year ago in the context of well-head sales, we again voiced the meaning of the exclusion in terms of an absolute prohibition of power:

"The exemption of production and gathering merely means that the physical activities, facilities and properties used by petitioner in the production and gathering of natural gas are not within the commission's power of regulation." Deep South Oil Company of Texas v. FPC, 5 Cir., 1957, 247 F. 2d 882, 889.

1955, 349 U.S. 254, 260, 75 S.Ct. 719, 99 L.Ed. 1040; see also *ICC* v. *Dunn*, 5 Cir., 1948, 166 F. 2d 116; *ICC* v. *Kroblin*, N.D.Ia. 1953, 113 F. Supp. 599, aff'd 8 Cir., 1954, 212 F. 2d 555.

It matters not what happens to regulation, it matters not how some assumed policy will be thwarted or impeded. The simple truth is that the Commission cannot take any step, impose any requirement, or condition in any way any activity which is directly a part of the "production • • • of natural gas" or directly concerned with "facilities and properties used" in the production of natural gas.

II.

This Court undertakes to find that at the time of delivery under these sales by Continental to El Paso production had ended. This will be analyzed in Part III. In my judgment, for this Court to state, "We think • • • this record discloses that there are facilities for the sale of the gas that are not facilities of production" is to disregard the function of this Court in the review of actions by the Federal Power Commission.

We are not the Federal Power Commission. We are not equipped to be the Federal Power Commission and we have not been commissioned to be the Federal Power Commission. We are not to find facts respecting matters committed to the Federal Power Commission. "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." §19(b), 15 USCA §717r(b). We are to *review* the fact decisions within a limited area and then determine on such fact findings whether the Commission has fairly applied the law. That the opinion of this Court is an invasion of the fact-finding function of the Federal Power Commission and is the assertion of a right to substitute our judgment for that of the expert body is

demonstrated by what the Commission did and did not do in this proceeding below.

The Commission, in its original order[4] overruling the Examiner's contrary findings, after first disposing of the jurisdictional sales issue no longer in this case then turned "to the question of whether there are facilities involved here to be certificated." The premise upon which the Commission proceeded was almost immediately stated. "The Court in upholding our position has clearly shown that 'facilities' apply to those facilities which serve the function of effecting the sale. *J. M. Huber Corp.* v. *FPC*, 236 F. 2d 550, 556, cert. denied 352 U.S. 971." This was followed by an assertion which equated the problem with one of *sales* in total disregard of *production*.[5] Right on the heels of this was a reiteration of the basic approach. "In this regard, Section 7(c) in referring to 'facilities therefor' and 'such facilities' reasonably applies to those facilities which serve the function of effecting the interstate sale or interstate transportation as the case may be."

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[4] September 6, 1957, Docket No. G-6346.

[5] The report went on to state:

"Obviously in this case there is a facility called a 'Christmas tree' between the producing well and the point of delivery to El Paso. It is apparent that under the Act a line must be drawn between sales facilities which must be certificated under Section 7(c) and other facilities without which a sale could not be made but which are not sales facilities within the meaning of Section 7(c) and for the operation of which no certificate is required. Drawing such a line requires consideration of the provisions and objectives of Section 7, of appropriate means for the attainment of the objectives of this section, of the characteristics of the producing segment of the natural-gas industry, of the administrative practicalities involved, and of such other circumstances as may exist in a given case."

As can be seen, Section 1(b) was not even given the barest mention.

The climax of the Commission's order was then immediately reached in terms which disregarded altogether the idea of *production*. "Applying these principles to the particular facts of Continental's operations, it is apparent that such portions of the 'Christmas tree' that are owned by Continental and serve to contain the gas at the point of delivery are facilities for effecting the sale of gas in interstate commerce, *regardless whether they serve also to effect production*. * * * 'Agere sequitur esse' says the logic primer: What a thing is is determined by what it does. It cannot reasonably be contended that the sale in this instance can be effectuated without the aid of Continental's facilities herein involved."[6] (emphasis supplied)

Despite vigorous well-organized exceptions which pinpointed the contentions advanced by Continental's petition for rehearing as required under Section 19(b), 15 USCA 717r(b), the extended order of the Commission denying application for rehearing is likewise noncommittal on the question of *production*. The Commission pointed out, respecting certification of facilities, that "these are the facilities, in the words of Section 7(c) of the act, which are for

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[6] In the formal findings section of the order, the Commission found: "2. The sale of natural gas hereinbefore described * * * is made in interstate commerce subject to the jurisdiction of the Commission, and such sale by Continental, *together with the operation of any facilities (which are included in the Christmas tree involved herein)* subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act." (emphasis supplied) In the formal order section the Commission ordered: "(A) A certificate of public convenience and necessity is hereby issued * * *, authorizing the sale by Continental of natural gas in interstate commerce for resale, together with the continued operation of *any facilities (which are included in the Christmas tree involved herein)*, subject to the jurisdiction of the Commission, *used for the sale* of natural gas in interstate commerce, as hereinbefore described * * *." (emphasis supplied)

the 'sale of natural gas, subject to the jurisdiction of the Commission.'" What were these facilities was then immediately identified in terms wholly apart from production. "The Commission has in this case, however, limited its certificate very narrowly to the most immediate facilities, part of the Christmas tree, owned by Continental, and serving to contain the gas at the point of delivery."

And, as the very last word of the Commission on this subject in this proceeding, it again makes clear that the Commission has not undertaken to determine when production has ended or whether production is still going on or where production ends. Consistent with its initial decision, it regards "facilities" as coextensive with the needs for delivery for sale wholly apart from considerations of production. All that "is material" the Commission states, "is that Continental owns facilities by means of which it possesses, delivers, and sells the gas and it is those facilities that are subject to this Commission's jurisdiction."[7]

So far as the Commission has determined, any and all equipment required "to contain the gas at the point of delivery" is a facility for such sale and subject to the Commission. It is entirely immaterial whether that equipment or appliance or its use is in *production* or whether when Continental *possesses* the gas, the process of possessing is simultaneously the process of production.

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[7] This quoted excerpt gains significance from its context.

"With respect to the Christmas tree Continental objects to our describing it in the original order as a facility between the producing well and the point of delivery, saying that the Christmas tree is part of the well. Whether the Christmas tree, in which delivery is made, is technically a part of the well is immaterial. The record clearly sets forth the physical facilities and the exact point of delivery. What is material is that Continental owns facilities by means of which it possesses, delivers and sells the gas and it is those facilities that are subject to this Commission's jurisdiction."

What the Commission does not find, this Court undertakes to do. This is beyond our statutory function.

III.

Finding an essential fact of this character is not only without statutory warrant. It is, with all deference to my Brothers who are articulate, conscientious and able juridical craftsmen, beyond the competence of us as Judges. This is at least so on this skimpy record which, apart from a photograph and the expert testimony the Court derides, note 5 of Court's opinion, as self-serving gossip, does not contain any evidence from which we, as non-technical men, could proceed to arrive at any such pronouncement of our own concerning the highly complicated field of gas engineering and production operations. Unless we have record facts or claim an omniscience which my modest Brothers would disavow, see Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. Law Review 751, I am at a loss to understand where the Court gets the wisdom or the experience or the information upon which to make this critical fact finding. Indeed, the statements are, in my view, not only bad law, they are bad engineering.

These deliverances find their climax in what I can only regard as surprising. After a supposititious concession that the lower, first, master valve might be used to "produce" the gas, the Court makes this remarkable statement. "Even including this valve as a facility of production may be argued to be conceptually an *anomaly* because, physically, production and delivery can be accomplished *without any valves at all.*" (emphasis added) With deference to my distinguished colleagues, the anomaly, in my judgment, is that at this day and time such a statement would or could be made. Indeed, the statement is self-defeating for it is followed by one which affirms that in the practice of the

industry, Christmas tree valves are used as an essential step in production. The Court states, "We fully recognize that for safety of *operation*, making adequate provision for repairs, etc., the unbroken custom in the industry is to contain the gas by a complex of two valves and associated equipment."

With today's high pressure gas reservoirs from which the long line transmission pipe lines carry essential fuel to the metropolitan consumers across the land, I cannot conceive how a gas well could be brought in without valves. It could not be because the conservation authorities would not permit it.[8]

Even in the figure of speech used by the Commission that it is a question of reducing the gas to possession for sale, this is an essential part of the process of production. For gas is not produced unless it is effectively reduced to the control of the one undertaking to dispose of it. Every facility which Continental owns — this includes the Christmas tree to the top of the 4-inch valve — is essential to production. This is established by uncontradicted proof. The proof is not that set forth in note 5 of the Court's opinion. There the witness was undertaking merely to describe what the industry considered the term "production" to mean as it might bear on ascertaining the Congressional intent in the selection of that terminology. In describing the process of drilling the wells in this field, his answers are unchallenged. Considering that the Federal Power Commission has an abundant staff of outstanding experts in the field of gas engineering and production, the failure of the staff

[8] Although this was a New Mexico well, the rules of the Texas Railroad Commission are typical. See Rule 44, "A blowout-preventer control head and other connections for keeping the well under control at all times shall be installed as soon as surface casing is set." Rule 45, "All wells shall be equipped with a Bradenhead." Rule 48, "All wells shall be equipped with adequate chokes, or beans, to properly control the flow thereof."

counsel to offer any rebuttal seems almost decisive. This witness, a senior production engineer for Continental, a graduate engineer with nearly ten years' experience in the field with gas problems and gas operations in Texas and New Mexico, was positive that the Christmas tree comprising the two master valves was indispensable:

> "Q. What is the purpose of the two master valves?
> "A. The two master valves are necessary to the production of the gas. Both of these valves were installed when the well was completed in January of 1949. Their installation was a necessary part of the completion of the well . . . ."

It was equally uncontradicted through him that this equipment was installed in all of Continental's wells numbering about fifty in that area. Here, of course, it was installed when the well was completed. The well was not completed until the Christmas tree was installed. This was six months before the sales contract was ever entered into.

When, even in our technical ignorance, we take into account that high pressures are involved in most modern gas wells, that conservation rules forbid the waste of gas into the atmosphere, that wells can be irretrievably damaged by improper or inadequate pressure controls during the critical stage of bringing them in, that lives would be needlessly exposed to serious hazards, it is plain to me that we cannot engage in fact findings of the kind undertaken by the Court here.[9]

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[9] I should emphasize here that what little information I may have absorbed in the midst of an oil and gas economy does not fit me to arrive at conclusions on which legal action may be based. This pinpoints the precise difference between me and my colleagues. They use their general knowledge to reach and declare a finding, i.e., non-production. From my resources I do not undertake to find the opposite. I conclude only that the record does not warrant their conclusion.

Indeed, I do not think that my cautious Brothers would have undertaken this excursion had they not first have found (or assumed) a basis for considering *production* in its ordinary, common usage. For clearly, what the Court says does not follow if the term is used in the sense of the oil and gas field. For example, the Court states, "In the ordinary language of purchase and sale of a product where it is in deliverable form the stream of gas is, in a sense, 'produced' at the latest after it has passed through the first master valve. * * *." Again, it states, "but this does not change the fact that in the *ordinary sense of the terms* production of the gas has been completed at or just above the surface of the ground where it is physically deliverable but then is shut in until delivery commences."

To support this approach, the Court frankly states that "our duty here is not to determine what is generally understood in the industry, in the resolution of other relationships, is meant by 'production.'" It is, rather, the Court goes on to say "to determine what Congress meant by the term." Reading §1(b) as though it contained only the first part of the sentence and disregarding altogether the exclusionary phrases at its end, the Court then proceeds to find that the sole Congressional purpose was "to regulate these interstate sales." This causes the Court then to reject the indusfry context and adopt a construction of "production" which "is in line with ordinary non-technical usage" so that it will "effectuate and not * * * frustrate the purpose of the law."

But Congress was not legislating in an atmosphere of "ordinary non-technical usage." The abundant legislative history canvassed by the many Supreme Court cases reveals an articulate awareness of the complexities of this whole business. The object of §1(b) was clearly to define the purpose to regulate transportation and sale and com-

panies engaged in such transportation or sale. This was done against the background fully known to Congress that at one end of the process was the production of the natural gas, that at the other end was the consumer, and in between were those who transported and distributed it. As pointed out in Part I above, the Court has been emphatic in ascribing an intention to Congress to exclude those matters which relate to the local production activities traditionally reserved to states for their exclusive control.

We are told that §1(b) exclusion is a provision " * * * that * * * precludes the Commission from any control over the activity of producing or gathering natural gas. * * *." *Colorado Interstate Gas Co.* v. *FPC*, 1945, 324 U.S. 581, 603, 65 S. Ct. 829, 89 L. Ed. 1206. Two years later this was reiterated in *Interstate Natural Gas Company* v. *FPC*, 1947, 331 U.S. 682, 690, ... S. Ct. ....., 91 L. Ed. 1742. "Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters."

Within another two years this was re-emphasized in *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498, 509-13, ... S. Ct. ....., 93 L. Ed. 1499. "To accept these arguments springing from power to allow interstate service, fix rates and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress. The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states."

How Congress expected to preserve the absolute freedom of the States in matters concerning production unless that term was used in the context of that industry is nowhere made clear by my Brothers. If Congress were to adhere to its purpose, carefully to regulate some but not all of the natural gas moving or dedicated to move in interstate commerce, it was required to prescribe the boundary limits of each in terms of the business and industry to be regulated. That is the usual, not the extraordinary, principle of statutory construction long ago set forth in *Unwin v. Hanson*, [1891] 2 Q.B. 115, 119, approved in *O'Hara v. Luckenback Steamship Co.*, 1926, 269 U.S. 364, 370-371, 46 S. Ct. 157, 70 L. Ed. 313:

> "If the act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."

And see 50 Am. Jur., Statutes §277 (1944).

What is "production of natural gas" is to be determined in the light of the actual substantive conditions and engineering-business requirements of that great field of scientific mechanical activity. Such activity is not to be assayed by Judges who, learned in the law, have naught but the limited technical experience and cumulative knowledge of the ordinary person.

Judged by the standards of the industry, not only by what was said and uncontradicted, but by what was done on a large scale in this very field, the Commission could only find that all of Continental's facilities were essential to and a part of the production of gas.

IV.

The Court's action and opinion is portentous. It is so precisely because it is based on an erroneous assumption and an equally erroneous construction. It assumes that we are fact finders to supplant or supplement the expert agency. It finds the capacity to cope with this problem by relieving it of all technical complexities and casting it in the mold of the ordinary meaning of *production*.

The Court finds "that in the *ordinary sense of the term* production of the gas has been completed at or just above the surface of the ground where it is physically deliverable. * * *." (emphasis in the original) Tying this in to the point of delivery (at the very extreme end of Continental's 4-inch master valve and at the very beginning of El Paso's swage), the Court has necessarily adopted the approach of the Commission that facilities for the sale of natural gas subject to the jurisdiction of the Commission are those "serving to contain the gas at the point of delivery." That it means to champion this construction is likewise established by the Court's unqualified approval, both here and in *Sun Oil Company* v. *FPC*, 5 Cir., 1959, ... F. 2d ....., [No. 17040], this day decided, of *J. M. Huber Corp.* v. *FPC*, 3 Cir., 1956, 236 F. 2d 550, 556 and *Saturn Oil & Gas Co.* v. *FPC*, 10 Cir., 1957, 250 F. 2d 61, 69, the latter of which states: "To us it is clear that facilities necessary to effect a sale of gas in interstate commerce are facilities used in interstate commerce and are within the jurisdiction of the Commission. This would seem to be the plain intent of section 7(c). The Third Circuit has so held in *J. M. Huber Corp.* v. *Federal Power Commission*, 3 Cir., 236 F. 2d 550, 556."

The vice of this rationale is compounded by the Court's interpretation of "production" or "production facilities" in terms of ordinary non-industry connotation. But even

without this, if the test is to be stated in terms of that piece of equipment which is needed to effectuate the sale or contain the gas at the point of sale delivery, then there is in fact no physical limitation. In those terms the master valve (whether upper or lower, or both) does not alone contain the gas. The master valves are ineffective without the continuation of the leak-proof surface casing, the production casing or many other parts of the well, all of which operate simultaneously and indispensably to bring and hold the gas under effective control.

That is critical since §7(c) requires certification of facilities which are to be constructed or extended. And once a little intrusion is made into the forbidden 1(b) area of production, it is only logical to expect (and justify) application of the full reach of this concept. It stops in a given well where, but only where, the particular piece of equipment may be said to directly assist in the containment of the gas at delivery point. Worse, it means that by the force of §7(c), the drilling and equipping of a new well could only be done by express approval of the Commission.

We and all others have now firmly held that on the commencement of the first jurisdictional sale, the Commission's power attaches at least to the sale. The Court by our present opinion holds that simultaneously power attaches to *some* piece of gas well equipment. If the jurisdictional sale setting all of this Federal control in motion is in the common form of a long-term dedication-of-reserves-contract by which the mineral owner undertakes to develop a field and deliver all production to the long line pipe line purchaser, the result will be that the drilling of additional wells may not be done except on Commission terms and approval. In such a situation the "new" well would, of course, be the means by which to effectuate the sale of the gas. Since this would constitute "the construction or extension of any

facilities" for the sale of natural gas subject to the jurisdiction of the Commission, and would result in the acquisition and operation of "such *facilities* or extensions thereof," it would, as §7(c) demands, positively require that the Commission issue a certificate of public convenience and necessity "authorizing such acts or operation."

Combining this opinion and *Sun Oil*, this day decided, this Court binds a gas well owner to *produce* gas for as long as the Commission prescribes. Neither the length of the contract nor the production-nature of the facility by which the "service" (sale) is performed are an effective limitation. Until nature shuts off the gas the Commission is the perpetual regulator from whose power the Commission's own brief says, "• • • there is no • • • hiding place." Congress did not mean to invest its creature with these scriptural powers (Psalms 139:7, 8). Section 1(b) draws the line at production.

I respectfully dissent.

Docket No. G-13272.

S. W. Richardson, et al.

Oct. 3, 1957.

Vinson, Elkins, Weems & Searls
Attorneys at Law
Esperson Building
Houston 2, Texas

Attention: Mr. Gene M. Woodfin.

Gentlemen:

This is with reference to the application of S. W. Richardson, et al., for a certificate of public convenience and necessity in Docket No. G-13272, and the tender by your letter of September 16, 1957 of the related proposed rate schedule consisting of a contract dated September 16, 1957 between S. W. Richardson and Southern Natural Gas Company.

Such certificate application covers the acreage of S. W. Richardson in the Gwinville Gas Units Nos. 4, 5, 6, 8, 22 and 29 in the Gwinville Field, Jefferson Davis County, Mississippi, and duplicates the acreage covered by the certificate issued to S. W. Richardson in Docket No. G-6252 for sales to the same buyer, Southern Natural Gas Company. Such previously issued certificate is still applicable to the gas sales from the acreage, even though the term of the gas sales contract, dated August 26, 1947 (which was incorporated by reference in such certificate application), has expired. In view of such duplication, the application of S. W. Richardson, et al., for a certificate of public convenience and necessity in Docket No. G-13272 is hereby rejected and the statement invoking Sections 157.28 and 157.29 of the Commission's Regulations, for temporary and emergency

authorization is not accepted. A copy of the rejected application is returned herewith.

In regard to the tender of the aforementioned new contract dated September 16, 1957 as a proposed rate schedule covering sales of gas from the aforementioned Gwinville gas units to Southern Natural Gas Company, such rate schedule duplicates the gas sales covered by Sid W. Richardson FPC Gas Rate Schedule No. 1, and such new rate schedule embodies a change to the effective rate for gas sales from such units. The proposed new rate schedule should be submitted as superseding the existing rate schedule and in accordance with Section 154.94 of the Commission's Regulations — Changes in Rate Schedules.

Since the tender of the proposed new rate schedule does not comply with Section 154.94 of the Commission's Regulations, it is hereby rejected and all copies returned herewith. Such rejection is without prejudice to the retender of the proposed rate schedule as a proposed change, together with the material required by Section 154.94.

Very truly yours,

J. G. GUTRIDE,

Secretary.

Enclosure No. 92793.
cc: Southern Natural Gas Company
P. O. Box 2563
Birmingham 2, Alabama

RGC
EMM:feh
10-2-57
cc: Files (3)
O. G. C. (2)
Mr. Nelson

ORDER DENYING MOTION FOR RECONSIDERATION

(Issued November 27, 1957.)

United States of America.

Federal Power Commission.

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

In the Matter of:

S. W. Richardson.

Docket No. G-13272.

S. W. Richardson (Richardson) on October 28, 1957, filed in this proceeding a motion for reconsideration of the Commission's action of October 3, 1957, whereby the Commission rejected Richardson's application of September 16, 1957, for a certificate of public convenience and necessity, and a contract related thereto, dated September 16, 1957, covering sales to Southern Natural Gas Company (Southern Natural) of natural gas produced from the Gwinville Field, Jefferson Davis County, Mississippi, at a proposed rate of 20 cents per Mcf, which was tendered as an initial rate schedule.[1] Richardson's motion additionally retendered for filing the certificate application and new contract previously tendered for filing on September 16, 1957, and also renewed his request for emergency and temporary authorization under Sections 157.28 and 157.29 of the Commission's Regulations.

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[1] The document tendered by Richardson is captioned as an "Application for Rehearing". Such an application may not be filed in this matter under our rules (Sec. 1.30(e)). However, we have accepted and considered the document as a motion for reconsideration.

The Commission's rejection of the application and the proposed filing of the contract was based upon the fact that a certificate previously issued in Docket No. G-6252, is still applicable to gas sales from the same gas producing acreage in Gwinville Field to the same buyer, Southern Natural, and that an existing effective rate schedule, Richardson's FPC Gas Rate Schedule No. 1, covers the continued service from that acreage, even though the contract previously filed as such rate schedule contains a termination date of September 9, 1957.[2]

Such rejection was made without prejudice to the retender of the proposed rate schedule as a proposed change in rate, together with the statements required by Section 154.94 of the Regulations.

The Commission finds:

The alleged assignment of error and the grounds advanced by Richardson for reconsideration of the Commission's rejection of his application filed September 16, 1957, for a certificate of public convenience and necessity, as above described, and his tender of the afore-mentioned new contract as an initial rate schedule set forth no facts of principles of law which either were not fully previously considered by the Commission, or which, having been now considered, warrant either the modification or the vacation of such rejection.

The Commission orders:

(A) The petition for reconsideration filed herein by S. W. Richardson on September 16, 1957, is hereby denied.

[2] Richardson has not, pursuant to Section 7 (b), obtained any approval of termination or abandonment of service under the existing rate schedule which provides the rate of 8.1857 cents per Mcf.

(B) The retender by S. W. Richardson on October 28, 1957, of the certificate application and contract previously tendered for filing on September 16, 1957, is hereby rejected; without prejudice, however, to Richardson's retender of his contract, dated September 16, 1957, as a notice of change to his FPC Gas Rate Schedule No. 1, together with the supporting statements required by Section 154.94 of the Commission's Regulations.

(C) The application of S. W. Richardson for emergency and temporary authorization, pursuant to Section 154.28 and 154.29 of the Regulations is hereby denied.

By the Commission. Commissioner Digby dissenting.

J. H. GUTRIDE,
(Joseph H. Gutride),
Secretary.

(Issued November 27, 1957.)

In the Matter of:

S. W. Richardson.

Docket No. G-13,272.

Digby, Commissioner, dissenting:

I am forced to dissent in this proceeding not only in the action of the Commission in overruling the motion for rehearing of the letter order dated October 3, 1957, but also in the authority and wisdom of issuing the original rejection. It is my view that the application for certificate of public convenience and necessity and rate schedule filing should have been accepted and at least fixed for hearing to determine whether or not the action is an increase in an existing rate or an initial rate. The letter of rejection was sent out

by the Secretary under his delegated authority but was not by the direction of the Commission. The fact that the land description or geographical area in the new filing may be the same as that in the old contract is not controlling. Certainly if the production is from a different reservoir than that covered by the old contract, it should be treated as an initial filing. I feel that the matter should have been set for hearing with the interested parties given an opportunity to present the facts and make a record from which the Commission could determine the issues.

S. L. DIGBY,

Commissioner.

PROVISIONS OF NATURAL GAS ACT
(Act of June 21, 1938, C. 556, 52 Stat. 821, as amended, 15 U.S.C. 717 et seq.)

SECTION. 1. (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days

from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a

statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: Provided, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. 717c (1946)]

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with the new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U. S. C. 717d (1946)]

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or

desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: Provided, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural-gas when to do so would impair its ability to render adequate service to its customers [52 Stat. 824 (1938); 15 U.S.C. 717f (a) (1946)].

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment [52 Stat. 824 (1938); 15 U. S. C. 717f (b) (1946)].

(c) No natural-gas company or person which will be a natural gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with-

respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. §717f (c) (1946)].

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall by regulation, require [56 Stat. 84 (1942); 15 U. S. C. § 717f (d) (1946)].

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require [56 Stat. 84 (1942); 15 U. S. C. § 717f (e) (1946)].

Sec. 19 (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehear-

ing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

FROM REGULATIONS UNDER THE NATURAL GAS ACT

154.94 *Changes in Rate Schedules*

(a) No change shall be made in any rate, charge or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission in duplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective. (Subsequently amended by Order 202, 23 F.R. 3715)

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate

schedule is to be operative after June 7, 1954, and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule there shall be submitted reasons, nature, and basis for the proposed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved.

(f) If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of the parties to whom such material has been mailed.

(g) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of the foregoing paragraphs in this Section,

file a statement showing (1) the approximate annual volume involved; (2) the rate charged therefor; (3) the name of the purchaser; and (4) the geographical location (field, county and State) at which delivery is made.

157.28 (c) *Temporary Authorization*

As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, inter alia, drainage, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties, or similar situations; and (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization.

157.29 *Exemption of emergency sales or transportation*

Public interest does not require the issuance of a certificate authorizing the sale or transportation of natural gas by an independent producer where imminent danger to life and property can be eliminated by such sale or transportation, and where such sale or transportation is limited to a single period of not more than sixty (60) days: *Provided, however*, That

(a) Every person undertaking such sale or transportation shall so advise the Commission immediately by telegram or letter stating briefly the circumstances and shall within ten (10) days file a statement in writing and under oath, together with four (4) conformed copies thereof, setting forth the purpose and character of the sale or transportation, the rate being charged, the facts warranting invocation of this section and the anticipated period of danger to life and property.

(b) Emergency operations thus undertaken without a certificate shall be discontinued upon expiration of the

60-day period, and all facilities installed for such temporary acts or operations shall be promptly removed and the Commission so advised in writing and under oath within 10 days following expiration of such 60-day period.

FROM RULES OF PRACTICE OF THE FEDERAL POWER COMMISSION

1.32 *Shortened procedures*

(b) Noncontested proceedings. In any proceeding required by statute to be set for hearing, the Commission when it appears to be in the public interest and to the interest of the parties to grant the relief or authority requested in the initial pleading, and to omit the intermediate decision procedure, may after a hearing during which no opposition or contest develops, forthwith dispose of the proceedings upon consideration of the pleadings and other evidence filed and incorporated in the record: *Provided*, (1) the applicant or initial pleader requests that the intermediate decision procedure be omitted and waives oral hearing and opportunity for filing exceptions to the decision of the Commission; and (2) no issue of substance is raised by any request to be heard, protest or petition filed subsequent to publication in the Federal Register of the notice of filing of an initial pleading and notice or order fixing date of hearing, which notice or order shall state that the Commission considers the proceeding a proper one for disposition under the provisions of this section, and shall otherwise conform with the requirements of §1.19. Requests for the procedure provided by this section may be contained in the initial pleading or subsequent request in writing to the Commission. The decision of the Commission in such proceeding after noncontested hearing, will be final, subject to reconsideration by the Commission upon application for rehearing as provided by statute.

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No. 308

FILED
SEP 3 1959

In the Supreme Court of the United States

October Term, 1959

E. W. Rubenstein, petitioner,

v.

Federal Power Commission

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

J. Lee Rankin,
Solicitor General,
Stephen Christian Mott,
Assistant Attorney General,
Samuel D. Slade,
Attorney,
Department of Justice,
Washington 25, D. C.

William W. Gutherie,
General Counsel,
Howard E. Wahrenbrock,
Solicitor,
C. Louis Stuart,
Attorney,
Federal Power Commission,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	3
Statement	3
Argument	5
Conclusion	12

CITATIONS

Cases:

Atlantic Refining Co. v. *Public Service Commission of New York*, 360 U.S. 378	8
Bel Oil Corporation v. *F.P.C.*, 255 F. 2d 548, certiorari denied, 358 U.S. 804	7, 8
Cities Service Gas Producing Company v. *F.P.C.*, 233 F. 2d 726, certiorari denied, 352 U.S. 911	7, 8
Continental Oil Co. v. *F.P.C.*, 266 F. 2d 208, pending on petition for certiorari, No. 203, this Term	10, 11, 12
Deep South Oil Co. v. *F.P.C.*, 247 F. 2d 882, certiorari denied, 355 U.S. 930	11
F.C.C. v. *WJR, The Goodwill Station*, 337 U.S. 265	11
Gulf Oil Corp. v. *F.P.C.*, 255 F. 2d 556	7
J. M. Huber Corp. v. *F.P.C.*, 236 F. 2d 550, certiorari denied, 352 U.S. 971	7, 8
Mississippi Power & Light Co. v. *Memphis Natural Gas Co.*, 162 F. 2d 388, certiorari denied, 332 U.S. 770	7, 8
Pennsylvania Water & Power Co. v. *F.P.C.*, 343 U.S. 414	6
Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672	3, 8
Sun Oil Company v. *F.P.C.*, 255 F. 2d 557, certiorari denied, 358 U.S. 804	7
Sun Oil Co. v. *F.P.C.*, 256 F. 2d 233, certiorari denied, 358 U.S. 872	11
Sun Oil Company v. *F.P.C.*, 266 F. 2d 222, pending on petition for certiorari, No. 321, this Term	5
Sunray Mid-Continent Oil Company v. *F.P.C.*, 239 F. 2d 97, reversed, 353 U.S. 944	7

Cases—Continued

	Page
Sunray Mid-Continent Oil Company v. *F.P.C.*, 267 F. 2d 471, pending on petition for certiorari, No. 335, this Term	7, 8
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332	5, 8
Wisniewski v. *United States*, 353 U.S. 901	12

Statutes:

Federal Power Act, Section 205d (Act of August 26, 1935, c. 687, 49 Stat. 851, 16 U.S.C. 824d (d))	6
Natural Gas Act (Act of Jun 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w):	
Section 1 (b)	10
Section 4	5, 6, 8
Section 4 (d)	4
Section 7	5
Section 7 (b)	4, 9, 10, 11
Section 7 (c)	7, 9
Section 7 (e)	7, 9
Section 19 (b)	2

Miscellaneous:

F.P.C. Regulations under the Natural Gas Act (18 CFR (1958 Cum. Supp.)):	
Section 154.91, *et seq.*	3
Section 154.92 (b)	4
Section 154.93	4
Section 154.94	4

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 208

S. W. RICHARDSON, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The letter order of the Federal Power Commission, dated October 3, 1957 (R. 123-125), is not reported. The Commission's order denying rehearing, issued November 27, 1957 (R. 137-140), is reported at 18 FPC 708. The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 1a-2a) is reported at 266 F. 2d 233.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1959 (Pet. App. 3a). The petition for a

writ of certiorari was filed on July 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19 (b) of the Natural Gas Act, 15 U.S.C. 717r (b).

QUESTIONS PRESENTED

A producer of natural gas was granted by the Federal Power Commission a certificate of public convenience and necessity to supply gas to an interstate pipeline, and to operate facilities for that sale, without any condition limiting the certificate to the term of his contract with the pipeline (10 years). The producer also filed the contract as his rate schedule pursuant to the Commission's rules. The questions presented are:

1. Does the expiration of the contract terminate the producer's certificate and obligation to supply gas to the pipeline?

2. Does the producer's subsequent execution of a new contract with the same pipeline for the same gas supply for a further period of years, but at a higher price, constitute a different "operation, sale, [or] service" for which a new certificate should be issued and an initial rate-filing made; or is the new higher rate a "change" in rate which is subject to a hearing under, and the procedures of, Section 4 of the Natural Gas Act?

3. In these circumstances, may the Commission without hearing reject the producer's application for a new certificate where it permits him to file his new contract as a "change" in rate for the sale covered by the previously issued certificate?

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the Natural Gas Act and the Federal Power Commission regulations are set forth in petitioner's Appendix at pp. 58a-69a.

STATEMENT

Petitioner, an independent producer of natural gas, sells gas at a separator located near the well-head of his gas well in the Gwinville Gas Field in Mississippi to an interstate pipeline. The sale was commenced under a contract (R. 12) entered into in August 1947, for a term of ten years from the date of first delivery (R. 35). Petitioner alleges that the ten-year term expired on September 9, 1957 (R. 128). The contract price was 7½¢ per Mcf for the first 5 years, and 8¢ for the next five (R. 32).

In November 1954, petitioner filed this contract with the Federal Power Commission as his FPC Gas Rate Schedule No. 1 (R. 12), pursuant to this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and the Commission's No. 174 series of orders (18 CFR (1958 Cum. Supp.) 154.91, *et seq.*), implementing that decision. On October 24, 1956, the Commission, upon petitioner's application (R. 49), issued a certificate of public convenience and necessity in Docket No. G-6252, "authorizing the sale by applicant of natural gas in interstate commerce for resale, together with the operation of any facilities, subject to the jurisdiction of the Commission, used for the sale of natural gas in interstate commerce * * *" (R. 75-76).

On September 16, 1957, petitioner entered into a new contract with the same pipeline (R. 90) "as of" September 16, 1957; applied to the Federal Power Commission for a certificate of public convenience and

necessity (R. 82); and tendered the new contract for filing as an "initial" rate schedule under Sections 154.92 (b) and 154.93 of the Commission's Rules (18 CFR 154.92 (b), 154.93) (R. 122). The new contract continued the identical delivery of gas from the same field and reservoir, but at the rate of 20¢ per Mcf (R. 111).

The new contract was to be in effect "* * * from and after the date of first delivery of gas hereunder" (R. 118). In his application for a new certificate, petitioner stated that all facilities for the delivery of gas were installed and that "* * * because of the imminent danger to life and property that would be occasioned by the shutting in of Applicant's wells or by the flaring of Applicant's gas from these Units in this highly developed area" (R. 86), he was selling gas from Gwinville Field to the pipeline on and *prior* to September 16, 1957 (R. 85-86), when the new contract was to become effective. Petitioner did not apply for approval of abandonment of the sale to the pipeline under Section 7 (b) of the Natural Gas Act, at any time.

The Commission, on October 3, 1957, rejected the application and the proffered filing because, as its letter (R. 123) explained, the certificate would have duplicated the previously issued certificates and the rate schedule would have increased petitioner's existing rate, and should have been filed as a rate-change under Section 4 (d) of the Natural Gas Act and in compliance with Section 154.94 of the Commission's Rules (Pet. App. 66a, *et seq.*). Petitioner applied for rehearing (R. 127) and the Commission denied reconsideration (R. 138), reiterating its previous explanation.

The court below, with Judge Brown dissenting, held that the same principles were applicable to this case

as those upon which its decision was based in *Sun Oil Company* v. *F.P.C.*, 266 F. 2d 222, pending on petition for certiorari, No. 321, this Term (Pet. App. 4a), a companion case decided the same day (Pet. App. 1a). It affirmed the Commission's order for the reasons set forth in the *Sun* case (Pet. App. 2a, 6a-11a).

ARGUMENT

Petitioner seeks to continue selling gas as he has heretofore, but at an increased price, without subjecting the increase to the Natural Gas Act's Section 4 procedures for suspension, hearing, and obligation to refund any part which the seller does not succeed in justifying. To this end he has entered into a new contract with the same pipeline-purchaser, and seeks to file the new agreement as an initial rate schedule (not subject to Section 4); he has also applied for a new certificate, although he has not sought or obtained permission to abandon his sale of gas under his first certificate. The Commission's rejection of this attempt, and its insistence that the new rate be filed as a change subject to Section 4, was clearly correct. No question of general importance requiring clarification by this Court, and no conflict of decisions, is presented.

1. Petitioner's basic argument (Pet. 13) is that "the provisions of the Act (Section 7) limit the certificating powers of the Commission to a sale (or service) 'proposed.' Here, the sale (or service) proposed was the [10 year] Contract, and no more." To certificate for a longer term, he contends (Pet. 12-13), "disregards the rule of *Mobile*,[1] which recognized the integrity of private contracts and their stature under the Act."

[1] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332.

But the Natural Gas Act is concerned with the sale or service and its continuity, and with the rate and its reasonableness, and not primarily with any private contract pertaining to these elements. This is the principle laid down by this Court under the cognate Federal Power Act in *Pennsylvania Water & Power Co. v. F.P.C.*, 343 U.S. 414, 421-424. In the *Penn Water* case, the producer-seller sought to avoid a Commission order fixing its rates for service from a pooling of electric generating facilities rendered under a contract which was held illegal under the antitrust laws in a private suit decided just after the rate order was first issued. Upon reconsideration in the light of that decision, the Commission reaffirmed its order as not dependent on the contract. This Court upheld the Commission's requirement that the service continue under the reduced rates, notwithstanding the disappearance of the contract. The opinion explained that (*id.* at 422):

> The duty of Penn Water to continue its coordinated operations with Consolidated springs from the Commission's authority, not from the law of private contracts.

The Court pointed out that discontinuance of the service could be accomplished, "provided Penn Water can prove that its wishes are consistent with the public interest", only by complying with the filing provisions of the Power Act[2] which correspond to those of Section 4 of the Natural Gas Act (343 U.S. at pp. 423-424).

There are several courts of appeals decisions in accord with this basic principle. *Bel Oil Corp. v. F.P.C.*,

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[2] Section 205 (d) of the Act of August 26, 1935, c. 687, 49 Stat. 851, 16 U.S.C. 824d (d).

255 F. 2d 548 (C.A.5), certiorari denied, 358 U.S. 804;[3] *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (C.A.5), certiorari denied, 332 U.S. 770; *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 239 F. 2d 97, 100-101 (C.A.10), reversed on other grounds, 353 U.S. 944; *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 267 F. 2d 471, pending on petition for certiorari, No. 335, this Term; *J. M. Huber Corp.* v. *F.P.C.*, 236 F. 2d 550, 558 (C.A.3), certiorari denied, 352 U.S 971; *Cities Service Gas Producing Co.* v. *F.P.C.*, 233 F. 2d 726, 730-731 (C.A. 10), certiorari denied, 352 U.S. 911.

In the first *Sunray* case, an independent producer applying for a certificate asserted, as petitioner does here, that the Commission must limit a certificate issued under Section 7 (c) of the Gas Act to the life of the producer's existing contract. Holding that the Commission could, under its Section 7 (e) power to impose certificate conditions, limit the term of a certificate if it finds such limitation required by the public convenience and necessity, the Tenth Circuit nevertheless stressed that, absent such a condition, the certificate must be for unlimited duration and (239 F. 2d at 100-101) that a contrary result would permit an independent producer to "dictate the terms and conditions of each certificate issued by the Commission. Applicants have no such rights." The court pointed out that protection of the public against exploitation depends on Commission control not only of initiation but cessation of service; the specific powers given the Commission to provide the public with adequate, reasonable, and continuous service would be useless if the natural gas

[3] Similar results were reached on the same ground in *Gulf Oil Corp.* v. *F.P.C.*, 255 F. 2d 556 (C.A. 5); *Sun Oil Co.* v. *F.P.C.*, 255 F. 2d 557, 559 (C.A. 5), certiorari denied, 358 U.S. 804.

companies could set, at the initiation of their public service, the date at which they would withdraw, abandon or cease their service". In the second *Sunray* case, the court affirmed a Commission refusal to limit the term of a producer's certificate, relying on the earlier opinion.

In *Huber*, the Third Circuit upheld Commission certification of an independent producer engaged in a jurisdictional sale on the date of the *Phillips* decision,[1] notwithstanding the producer's attempt to stop its sale rather than continue under Commission regulation, as specifically permitted by a clause in its contract. Answering the argument that refusal to allow it to exercise its contract right to stop selling was violative of the Fifth Amendment, the court said that the company had given service upon which the public had relied for years and was entitled to continue to rely unless abandonment was approved by the Commission (236 F. 2d 558). In the *Bel Oil*, *Mississippi*, and *Cities Service* cases, the Fifth and Tenth Circuits upheld Commission regulation of increases in rates which producers sought to put into effect, under escalation provisions of previously-filed contracts, without becoming subject to the provisions of Section 4 for suspension, hearing, and refund.

Petitioner's reliance on the philosophy of *Mobile* to support his claim that the contract controlled the term of his obligation to supply gas is answered here, as it was in *Atlantic Refining* v. *Public Service Commission of New York*, 360 U.S. 378, 392:—by granting an unlimited certificate the Commission does not fix the term or overturn the term fixed by the contract between the parties; rather, it authorizes the sale for an un-

[1] *Phillips Petroleum Corp.* v. *Wisconsin*, 347 U.S. 672.

limited term so that the consuming public may be protected, leaving open the question of whether the service may be abandoned (on the date fixed for the end of the contract) for determination under Section 7 (b) of the Act (pertaining to abandonment) upon the facts which are relevant at that time.

2. Petitioner also contends that, in any event, the Commission had here limited the term of the certificate because of the provision that it should "be effective only so long as applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission" (R. 76), and that petitioner had terminated the certificate by stopping service for "several days" when its contract expired (Pet. 15). This argument, too, is without merit. Petitioner rightly concedes (Pet. 15) that he could not terminate his obligation to serve by *unlawfully* stopping deliveries; and his contention that he *lawfully* stopped delivery depends on the argument that his obligation to serve was limited to the term of his contract—a proposition which, as shown above, is wholly incorrect.

Moreover, the court below, assuming that a limited term certificate might have been issued under Section 7 (c) and (e) of the Act, found "nothing to show any intent of the Petitioner to apply for a limited or conditional certificate, nor * * * anything to indicate that the Commission intended to limit its certificate" (Pet. App. 9a). In this conclusion the court was fully warranted by the complete absence of any finding by the Commission, in issuing the certificate, that the public convenience and necessity "required" (Section 7 (e)) or "permitted" (Section 7 (b)) abandonment of the

authorized service at any time, as well as by the absence of any reference in the Commission's order to the contract or its term (R. 61-77).

By the same token, no hearing was required. The certificate was clear upon its face, and required no elucidation by evidence; petitioner does not claim that a mistake was made or present any other reason why a hearing should have been held. There was no real dispute on any matter of fact, but only as to the applicable legal principles.

3. Petitioner accepted the original certificate "authorizing the sale by applicant of natural gas in interstate commerce for resale, *together with the operation of any facilities, subject to the jurisdiction of the Commission, used for the sale* * * *" (emphasis added).[5] Although he does not include it among his questions presented urged as reasons for granting the writ (Pet. 2-3), he contends that the Section 7 (b) prohibition of abandonment without Commission approval does not apply because his sale, made by delivery "to Buyer at the separators which are located adjacent to the respective wellheads" (R. 52), is not made by means of facilities subject to the jurisdiction of the Commission. This, he argues, is because such facilities are exempted by Section 1 (b) of the Act as "production" (Pet. 16-17).

The contention that a producer's sale at or near the well-head is made by means of jurisdictionally exempt "production" facilities has been consistently rejected

[5] He did not object to the certification of the operation of jurisdictional facilities or apply for rehearing (cf., *Continental Oil Co.* v. *FPC*, No. 203, this Term, where the applicant, which also had asked for a declaratory disclaimer of jurisdiction, contested the Commission's certification of facilities).

by the Commission where delivery has been made at a point comparable to that alleged here. Hence, the Commission and the court below were justified in treating this allegation as likewise legally insufficient and not requiring a hearing." The court properly cited its decision rendered the same day in *Continental Oil Co.* v. *F.P.C.*, 266 F. 2d 208 (pending on petition for certiorari, No. 203, this Term), as controlling on this issue. See the Brief for the Federal Power Commission in Opposition, No. 203, this Term.

Petitioner impliedly admits that the Fifth Circuit's *Continental* decision is opposed to his contention on "jurisdictional" facilities, but he claims an intra-circuit conflict with *Deep South Oil Co.* v. *F.P.C.*, 247 F. 2d 882 (C.A.5), certiorari denied, 355 U.S. 930 (see Pet. 18). This assertion is based on the statement in the *Deep South* opinion[7] that the "exemption of production and gathering merely means that the physical activities, facilities and properties used by petitioner in the production and gathering of natural gas are not within the commission's power of regulation" (247 F. 2d at p. 889). The court below denied any conflict

[6] See *F.C.C.* v. *WJR, The Goodwill Station*, 337 U.S. 265; *Sun Oil Co.* v. *F.P.C.*, 256 F. 2d 233, 240-241 (C.A. 5), certiorari denied, 358 U.S. 872.

[7] In *Deep South*, the court had under review the issuance of a certificate (like the one originally issued to petitioner) covering a producer's sale and operation of "any" jurisdictional facilities for the sale. The court held that it did not have to decide whether the producer could discontinue the sale without Commission permission. Section 7 (b) requires Commission permission to abandon jurisdictional facilities "or any service rendered by means of such facilities," and the court's decision therefore meant that it was not deciding whether there were any facilities for making the *Deep South* sale which were subject to Commission jurisdiction.

(Pet. App. 11a), and this is clearly so under the actual basis of its decision in *Continental, i.e.*, that the facilities which contain the gas at the point of delivery at the upper aperture of the upper valve in the well-head "Christmas tree" were facilities for sale, and that "production, as the term is used in this statute, was complete at or before the passage of the gas through the upper aperture of the upper valve" (266 F. 2d at 212). Here, the gas is delivered after it has passed from the well, and not only through the "Christmas tree", but also through connecting pipes and the nearby separator.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
Attorney.

WILLARD W. GATCHELL,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

C. LOUIS KNIGHT,
Attorney,
Federal Power Commission.

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[8] In any event, an intra-circuit conflict is not ground for review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901.

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